

71908
TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1911~~ 1911

No. ~~■■■~~ 304

SEABOARD AIR LINE RAILWAY, PLAINTIFF IN ERROR,

vs.

ERNEST N. DUVALL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

FILED MAY 27, 1910.

(22,199.)



(22,199.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 578.

SEABOARD AIR LINE RAILWAY, PLAINTIFF IN ERROR,

vs.

ERNEST N. DUVALL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

INDEX.

	Original.	Print.
Transcript from superior court of Moore county.....	1	1
Summons.....	1	1
Sheriff's return.....	2	1
Complaint	3	2
Answer of receivers.....	6	4
Plea in abatement of receivers.....	8	6
Order on plea in abatement.....	10	7
Appearance of the Seaboard Air Line Railway.....	12	9
Answer of Seaboard Air Line Railway.....	13	9
Jury called.....	15	11
Issues and verdict.....	16	11
Minute entries.....	16	12
Judgment.....	16	12
Case on appeal.....	17	13
Statement of case.....	17	13
Testimony of Ernest N. Duvall.....	18	13
Dr. Lomax Gwathney.....	29	21
Capt. W. T. Cox	38	27
W. P. Rowe.....	47	33
W. M. Kelly.....	55	39
C. G. Petty.....	56	39
O. P. Makepeace.....	57	40

	Original.	Print
Testimony of E. D. Nall.....	58	41
S. C. Moffitt.....	60	42
T. A. Yarborough.....	60	42
O. M. Yarborough.....	61	42
Thomas Gross.....	62	43
J. J. White.....	62	43
W. H. Howell.....	63	44
W. H. Maddrey.....	63	44
Ed. C. Robinson.....	64	44
Capt. Wren.....	65	45
Rules Nos. 662, 663, and 664.....	67	46
Testimony of G. F. Bronson.....	67	46
Dr. W. A. Monroe.....	70	48
Mrs. McBraney.....	75	52
Dr. Holliday.....	76	52
Dr. A. H. McLeod.....	84	57
Dr. Lem McIver.....	85	58
Dr. Gilbert McLeod.....	86	58
Dr. F. S. Hope.....	90	61
Capt. Cox (recalled).....	96	65
J. A. Duvall.....	96	65
Mr. Lyon.....	97	66
Capt. Cox (recalled).....	100	68
Ernest Duvall (recalled).....	104	70
Mr. Merchant.....	108	73
Mr. Land.....	109	74
Ernest Duvall (recalled).....	111	75
Plaintiff closes.....	111	75
Instructions prayed by defendant.....	111	75
Judge's charge.....	115	78
Assignment of errors.....	124	84
Judge's certificate to case on appeal.....	132	89
Appeal bond.....	132	89
Clerk's certificate.....	133	90
Docket entries.....	133	90
Opinion.....	134	91
Judgment.....	136	92
Petition for writ of error.....	137	92
Order allowing writ of error.....	152	101
Writ of error.....	153	101
Citation.....	155	103
Marshal's return.....	156	103
Assignment of errors.....	157	103
Bond on writ of error.....	164	107
Clerk's certificate.....	168	109

1

DUVALL
against
SEABOARD AIR LINE RAILWAY.

NORTH CAROLINA,

Moore County:

Be it remembered, that on the 28th day of August, 1909, E. N. Duvall sued and prosecuted out of the Superior Court of Moore County a summons, in these words and figures:

Summons for Relief.

MOORE COUNTY:

In the Superior Court.

E. N. DUVALL
against

S. DAVIES WARFIELD, R. LANCASTER WILLIAMS, and E. C. DUNCAN,
Receivers of Seaboard Air Line Railway.

The State of North Carolina to the Sheriff of Moore County, Greeting:

You are hereby commanded to summon S. Davies Warfield, R. Lancaster Williams and E. C. Duncan, receivers Seaboard Air Line Railway, the defendants above named, if they be found within your county, to be and appear before the Judge of our Superior Court, at a court to be held for the county of Moore, at the courthouse in Carthage, N. C., on the third Monday after the last Monday of August, it being the 20th day of September, 1909, and answer the complaint, which will be deposited in the office of the clerk of the Superior Court of said county within the first three days of said term; and let the said defendants take notice that if they fail to answer the said complaint within the time required by law, the plaintiff will apply to the Court for the relief demanded in the complaint.

Hereof fail not, and of this summons make due return.
Given under my hand and seal of said Court, this 28th day of August, 1909.

J. ALTON McIVER,
Clerk Superior Court.

We acknowledge ourselves bound unto S. Davies Warfield, R. Lancaster Williams and E. C. Duncan, receivers of Seaboard Air Line Railway, the defendants in this action, in the sum of two hundred dollars; to be void, however, if the plaintiff shall pay to the defendants all such costs as the defendants may recover of the plaintiff in this action.

Witness our hands and seals, this 28th day of August, 1909.

E. N. DUVALL, [SEAL.]
By His Attorneys, DOUGLASS & LYON,
W. T. COX.

And on the return day of said summons the Sheriff of Moore County made the following return on said summons:

"Received August 31, 1909. Served September 2, 1909, by reading to B. F. Teague, agent of S. A. L. Railway Company, at Cameron, N. C.; also delivering to him a copy of same."

A. C. KELLY,
Sheriff of Moore County,
By T. F. CAMERON, *D. S.*"

And thereupon the said E. N. Duvall, by his attorneys, Douglass & Lyon, on the 18th day of September, 1909, came and complained as follows:

NORTH CAROLINA,
Moore County:

In the Superior Court, September Term, 1909.

(Title of Cause.)

The plaintiff, complaining of the defendants, alleges:

1. That on or about the 2d day of January, 1908, S. Davies Warfield, R. Lancaster Williams and E. C. Duncan were duly appointed receivers of the Seaboard Air Line Railway by the Judge of the Circuit Court of the United States for the Eastern District of North Carolina, of the Fourth Circuit, and have, ever since said time, been operating the said railroad as common carriers in the transportation of passengers and freight, and that on the 12th and 13th days of March, 1909, the said receivers were operating a line of railway from Portsmouth, Va., via Moneure, N. C., and other points and stations to Monroe, N. C., and points beyond.

2. That on the 12th and 13 days of March, 1909, the plaintiff, a young man, twenty-five years of age, in perfect health, was in the employ of the defendants as baggage master and flagman on one of the defendant's passenger trains which was being operated from Portsmouth, Va., to Monroe, N. C., and points beyond, and on the night of the 12th day of March, 1909, the said train, known as designated as train No. 33, was scheduled to leave Portsmouth, Va., at about 9 o'clock P. M.; that said passenger train left Portsmouth on said 12th day of March, 1909, at the time designated and scheduled, and proceeded on its way south towards Monroe, N. C., and plaintiff was in and upon said passenger train, in the discharge of his duty as baggage master and flagman.

3. That when said passenger train had reached a point on defendant's railway a short distance south of Moneure, N. C., on the morning of March 13th, about 4:40 o'clock, the defendants negligently, carelessly and recklessly started and ran a heavily loaded

4 and rapidly moving freight train, drawn by a locomotive engine, upon the same track and in the direction of the said approaching passenger train, upon which plaintiff was employed and engaged, and in the discharge of his duty, causing the locomotives of the said passenger train and the said freight train to meet in a head-on collision, wrecking the said locomotives and a number of the passenger and other cars composing the two trains. That when the said trains collided, as aforesaid, the plaintiff was crushed, bruised, wounded, shocked and thrown under a mass of debris, and seriously, permanently and painfully injured, where he remained for a long space of time and endured great physical suffering and mental agony and fright, to his great damage.

4. That at the time of the said wreck and the injury to the plaintiff, it was raining and very cold, and the plaintiff's sufferings were greatly aggravated and enhanced by the inclement weather, and he was allowed to remain at the said wreck, after his injury, as aforesaid, for a long time, to-wit, several hours, before he was removed to a hospital and given proper medical attention, and he suffered great physical pain and mental agony.

5. That before the injury sustained on account of the negligence of the defendants in the wreck, hereinbefore described, the plaintiff was a young man, twenty-five years of age, in perfect health, strong, constitutionally, and of active mental powers, but on account of the negligence of the defendant, as hereinbefore alleged, the plaintiff has become a total physical wreck and has suffered great bodily pain and mental anguish; has been made a hopeless cripple, has suffered great nervous derangement, to his great damage.

6. That in the said wreck, which was caused by the gross negligence, carelessness and recklessness of the defendants, as aforesaid, the plaintiff's back and one of his legs were broken, and as a consequence thereof he has become a helpless paralytic from his waist to his lower extremities; has suffered and still suffers, and so long as he lives will continue to suffer excruciating bodily pain and mental anguish; is totally and permanently disabled and incapacitated to perform any kind of labor, rendered helpless and totally dependent; has lost his occupation and the profits therefrom; has been put to much expense for medicines and medical attention and nursing, and his been damaged in the sum of seventy-five thousand dollars (\$75,000).

5 Wherefore, the plaintiff demands judgment against the defendants for damages in the sum of seventy-five thousand dollars, for the costs of this action, and such other and further relief.

DOUGLASS & LYON,
Plaintiff's Attorneys.

STATE OF VIRGINIA,
County of Norfolk:

I, F. E. Gerke, a notary public in and for the State and city of Portsmouth, county aforesaid, do hereby certify that E. N. Duvall, the plaintiff in the foregoing action, personally appeared before me

this day, and, being by me duly sworn, deposes and says that the foregoing complaint is true, of his own knowledge, except as to matters therein stated upon information and belief, and as to those matters he believes it to be true.

E. N. DUVALL.

Subscribed and sworn before me, this 14th day of September, 1909.

[OFFICIAL SEAL.]

F. E. GERKE,
Notary Public.

My commission expires the 14th day of March, 1910.

I hereby certify that no tax is required by the laws of Virginia upon the seal hereto affixed.

F. E. GERKE,
Notary Public.

On the reverse the following:

"E. N. Duvall v. S. Davies Warfield et als., Receivers Seaboard Air Line Railway.—Complaint.—Filed this 18th day of September, 1909. J. Alton McIver, Clerk Superior Court."

And the said S. Davies Warfield, R. Lancaster Williams and E. C. Duncan, receivers Seaboard Air Line Railway, on the 27th day of October, 1909, by their attorneys, Walter H. Neal and U. L. Spence, came and pleaded as follows:

6

Answer.

NORTH CAROLINA,
Moore County:

In the Superior Court, to September Term, 1909.

(Title of Cause.)

The defendants, answering the complaint, say:

1. That paragraph of the complaint marked 1 is true.
2. In answer to paragraph of the complaint marked 2, the defendants say that they have no knowledge or information sufficient to form a belief as to the truth of that part of the said paragraph which alleges that "the plaintiff, a young man, of twenty-three years of age and perfect health," and that part of the said paragraph is denied.
3. In answer to paragraph 3 of the complaint, the defendant admits "that when said passenger train had reached a point on defendant's railway a short distance south of Moncure, N. C., on the morning of March 13th, about 4:40 o'clock, the defendants negligently and carelessly started and ran a loaded and rapidly moving freight train, drawn by a locomotive engine, upon the same track and in the direction of the said approaching passenger train upon which plaintiff was employed and engaged in the discharge of his duty, causing the locomotives of said passenger train and the freight train to meet

in a head-on collision, and that the plaintiff was seriously and painfully injured"; and as to the remaining part of the said paragraph the defendants have no knowledge or information sufficient to form a belief, and they therefore deny the same.

4. The defendants have no knowledge or information sufficient to form a belief as to the truth of paragraph of the complaint marked 4, and the same is therefore denied.

5. The defendants have no knowledge or information sufficient to form a belief as to the truth of paragraph 5 of the complaint, and the same is therefore denied.

6. The defendants have no knowledge or information sufficient to form a belief as to the truth of paragraph 6 of the complaint, and the same is therefore denied.

7. Wherefore, the defendants pray that they go without day and recover their just and reasonable costs.

WALTER H. NEAL,
U. L. SPENCE,
Attorneys for Defendants.

STATE OF NORTH CAROLINA,
County of Wake:

I, C. T. McDonald, a notary public in and for the county and State aforesaid, do hereby certify that E. C. Duncan, receiver, one of the defendants in the foregoing action, personally appeared before me this day, and, being by me duly sworn, deposes and says that the foregoing answer is true, of his own knowledge, except as to those matters therein alleged and stated on information and belief, and as to those matters he believes it to be true.

E. C. DUNCAN, *Receiver.*

Sworn to and subscribed before me, on this the — day of October, 1909.

Witness my hand and official seal, this the same day.

[NOTARIAL SEAL.]

C. T. McDONALD,
Notary Public.

My commission expires on the 1st day of February, 1910.

On the reverse the following:

"576.—Duvall vs. Receivers S. A. L.—Answer.—Filed Oct. 27, 1909. J. Alton McIver, C. S. C."

And thereafter, at a regular term of the Superior Court of Moore County, begun and held on the sixth Monday before the first Monday in March, 1910, with Honorable C. C. Lyon, Judge, presiding, the said S. Davies Warfield, R. Lancaster Williams and E. C. Duncan, by their attorneys, Walter H. Neal, and U. L. Spence, came and pleaded as follows:

In the Superior Court, January Term, 1910.

(Title of Cause.)

S. Davies Warfield, R. Lancaster Williams and E. C. Duncan, the parties above denominated "receivers of the Seaboard Air Line Railway," respectfully show to the Court:

(1) That since the institution of this action and the filing of the answer herein, the said S. Davies Warfield, R. Lancaster Williams and E. C. Duncan have, pursuant to the decree of the Circuit Court of the United States for the Fourth Circuit, had in the proceedings in which the said parties were originally appointed the receivers of the Seaboard Air Line Railway, transferred and delivered into the possession of said railway all of the property, effects and assets of every nature and description which came into their hands as receivers of said railway, and were by the decree of said Court, dated the 4th day of November, 1909, fully discharged and relieved from all of the duties and obligations of said receivership in like manner and extent as if the same had never existed; and the bondsmen of said receivers were likewise discharged from all further obligations to guarantee and secure the faithful discharge of the duties of said receivership.

(2) That under and by virtue of the decree of said Circuit Court discharging and relieving said receivers from the further duties and obligations of said receivership, the Seaboard Air Line Railway, as they are informed and believe, took possession of all the property, effects and assets turned over to it by said receivers, subject to the just and lawful claims of all persons against said receivers arising and accruing during the said receivership; and the said railway now holds, operates and enjoys the said property, effects and assets, subject to the right of said claimants to prosecute any and all actions or causes of action accruing against said receivers during the said receivership, for the purposes of establishing and enforcing said rights, actions or causes of action which may have so accrued.

9 (3) That the said S. Davies Warfield, R. Lancaster Williams and E. C. Duncan have no assets, property or other effects of any nature or description which came into their hands as such receivers, out of which to satisfy any judgment which might be recovered against them in this action, and have no means by which to compel the Seaboard Air Line Railway to indemnify them against any loss or damage that might accrue to them by reason of any such recovery, as the affairs of said receivership and the proceedings under which the same was created have been fully wound up and determined.

(4) That as they are advised and believe, the said S. Davies Warfield, R. Lancaster Williams and E. C. Duncan are not, and never have been, personally liable to the plaintiff for any injuries which he may have sustained as the result of the alleged negligence of their employees while they were engaged in operating said road as receivers aforesaid; but their liability, if any, was only in their official

capacity as such receiver-, and then only to the extent of any property, effects and assets which may have come into their hands while acting as such; and as they have been discharged of the duties of said receivership, and have fully accounted to the Court for all property, effects and assets which came into their hands as such, the plaintiff has no further right to prosecute his said action against them as individuals or otherwise.

(5) That as they are advised and believe, the said S. Davies Warfield, R. Lancaster Williams and E. C. Duncan are no longer, either necessary or proper parties to this action, and that, as to them, the same should abate or be dismissed, and the plaintiff should be required to prosecute his said cause of action, if any, against the Seaboard Air Line Railway, in whose hands all the property, effects and assets which came into the hands of said receivers, or were not otherwise legitimately disbursed, now are.

Wherefore, the said S. Davies Warfield, R. Lancaster Williams and E. C. Duncan, through their attorneys, U. L. Spence and Walter H. Neal, pray the Court that said action abate or
10 be dismissed, as to them, and that they go hence, with their reasonable costs in this behalf incurred since the date of their discharge as receivers of the Seaboard Air Line Railway.

S. DAVIES WARFIELD,
R. LANCASTER WILLIAMS,
E. C. DUNCAN,
By WALTER H. NEAL,
U. L. SPENCE, *Attorneys.*

On the reverse the following:

"576.—Duvall v. Seaboard Air Line Receivers.—Petition of Receivers.—Filed January 27, 1910. J. Alton McIver, C. S. C. Recorded Minute Book 13, pages 11-12. J. Alton McIver, C. S. C."

And upon the plea and abatement filed by the said S. Davies Warfield, R. Lancaster Williams and E. C. Duncan, the Court, at said term, made the following order, to-wit:

Order.

NORTH CAROLINA,
Moore County:

In the Superior Court, January Term, 1910.

(Title of Cause.)

This cause coming on to be heard upon the plea in abatement filed by the said S. Davies Warfield, R. Lancaster Williams and E. C. Duncan, and it appearing therefrom that since the institution of this action and the filing of the answer herein, that the said defendants have, pursuant to the decree of the Circuit Court of the United States for the Fourth Circuit, had in the proceedings in

which said parties were originally appointed receivers of the Seaboard Air Line Railway, transferred and delivered into the possession of said railway all of the property, effects and assets of
11 every nature and description which came into their hands as receivers of said railway, and were by the decree of said Court dated the 4th day of November, 1909, fully discharged and relieved from all of the duties and obligations of said receivership, in like manner as if the same had never existed, and that the bondsmen of said receivers have likewise been discharged from all further obligations to guarantee and secure the faithful discharge of the duties of said receivers, which facts are admitted by the plaintiff:

It is, therefore, on motion of U. L. Spence and Walter H. Neal, attorneys for said defendants, ordered and adjudged that the said action, as to the said S. Davies Warfield, R. Lancaster Williams and E. C. Duncan, do abate, and the same is hereby dismissed and they are permitted to go hence without the further order or direction of this Court, but without costs against plaintiff.

And it further appearing from the said plea in abatement that, under and by virtue of the said decree of said Circuit Court, discharging and relieving said receivers from the further duties and obligations of said receivership, *that* the Seaboard Air Line Railway took possession of all the property, effects and assets turned over to it by said receivers, subject to the just and lawful claims of all persons against said receivers arising and accruing during said receivership, and that the said railway now holds, operates and enjoys the said property, effects and assets, subject to the right of said claimants to prosecute any and all actions or causes of action so accruing against said receivers for the purpose of establishing and enforcing the same against said railway:

It is, therefore, on motion of Douglass & Lyon and H. F. Seawell, attorneys for the plaintiff, ordered that the Seaboard Air Line Railway be and it is hereby made a party defendant in this action, and is directed to appear and answer or demur to the complaint heretofore filed herein, in such manner as it may be advised. And unless the said railway shall enter its voluntary appearance herein at this
12 term of the Court and answer or demur to said complaint,
that process issue out of this Court, returnable to the next term thereof, requiring said railway to appear and answer or demur to said complaint within the time allowed by law, or judgment will be rendered against it according to the prayer of the complaint.

C. C. LYON,
Judge Presiding.

On the reverse the following:

"576.—Duvall v. S. A. L. Ry.—Order, Jan., 1910.—Minute Docket No. 13, pages 14-15."

And thereupon the Seaboard Air Line Railway, through its attorneys, Walter H. Neal and U. L. Spence, enters in said cause its voluntary appearance as defendant, in words and figures as follows, *to-wit*:

Appearance of the Seaboard Air Line Railway.

NORTH CAROLINA,
Moore County:

In the Superior Court, January Term, 1910.

(Title of Cause.)

The Seaboard Air Line Railway hereby enters its voluntary appearance as defendant herein and expressly waives its right to be brought in by process of this Court and hereby agrees that the said cause stand for trial and be tried at the present term of said Court, on condition it be permitted to file an unverified answer in the case.

SEABOARD AIR LINE RAILWAY,
By WALTER H. NEAL,
U. L. SPENCE, *Attorneys.*

On the reverse side the following:

"576.—E. N. Duvall vs. S. A. L. Ry.—Appearance of S. A. L. Ry.—Jan., 1910.—Minute Docket No. 13, page 14. J. Alton McIver, C. S. C."

And thereupon, upon permission of the Court, during said term and upon the 27th day of January, 1910, Seaboard Air Line
13 Railway, through its attorneys, Walter H. Neal and U. L. Spence, filed in said cause its answer to the complaint of the plaintiff, in words and figures following, to-wit:

Answer.

NORTH CAROLINA,
Moore County:

In the Superior Court, January Term, 1910.

(Title of Cause.)

The defendant, the Seaboard Air Line Railway, having, upon the order of the Court, voluntarily appeared as the defendant in this action, after the abatement of the same as against its former receivers, for answer to the complaint originally filed herein, says:

(1) That it admits the allegations of article 1 thereof, but alleges that since the institution of this action and the filing of the answer herein by its former receivers, they, pursuant to the decree of the Circuit Court of the United States for the Fourth Circuit, have transferred and delivered into the possession of this defendant all the property, effects and assets of every nature and description which came into their hands as its receivers, and were by the decree of said Court dated the 4th day of November, 1909,

fully discharged and relieved from all the duties and obligations of said receivership, and that under and by virtue of said decree this defendant took possession of all the property, effects and assets turned over to it by said receivers, subject to the just and lawful claims of all persons arising against said receivers prior to their discharge, and that this defendant now holds, operates and enjoys the said property, effects and assets, subject to the right of said claimants to prosecute against it any and all actions accruing against said receivers during said receivership.

(2) Answering article 2 of the complaint, the defendant says that so much thereof as alleges, either directly or indirectly, that the plaintiff was, at the time of his alleged injuries, in the employ of the then receivers of this defendant as baggage master and flagman, and in the discharge of his duties as such upon said train, is untrue and denied. As to that part of said article which alleges that the plaintiff was a young man, twenty-five years old, and in perfect health at the time of his injury, the defendant says that it has no knowledge or information upon which to base a belief as to the truth thereof, and therefore holds him to strict proof.

(3) That article 3 of the complaint is denied; but in this connection the defendant admits that when said passenger train had reached a point on its railway a short distance south of Moneure, North Carolina, at about 4:40 o'clock on the morning of March 13, 1909, a freight train, operated by the employees of said receivers, met in a head-on collision with the passenger train on said track, in the express car of which the plaintiff was riding, by permission of the express messenger, which collision caused the derailment of said express car, thereby wounding and injuring the plaintiff to some extent, and that the collision of said trains was due to the carelessness of some of the agents or employees of said receivers.

(4) That defendant has no knowledge or information upon which to base a belief as to the truth of article 4 of the complaint, and therefore holds the plaintiff to a strict proof.

(5) That the defendant has no knowledge or information upon which to base a belief as to the truth of article 5 of the complaint, and therefore holds the plaintiff to a strict proof.

(6) That the defendant denies that said wreck was caused by the gross negligence, carelessness or recklessness of the said receivers; but admits that it was due to the carelessness of one or more of their employees in failing to properly protect said passenger train from a collision with said freight train. As to so much of said article of the complaint as alleges the extent of the plaintiff's injuries, the defendant says it has no knowledge or information upon which to base a belief as to the truth thereof, and therefore holds the plaintiff to strict proof. So much of said article as alleges that the plaintiff has suffered \$75,000 damages on account of his injuries is denied.

For a further answer and defense, this defendant says:

(1) That if the plaintiff was injured as a result of the negli-

gence of the then receivers of this defendant, which it denies, he caused and contributed to his own injuries, in that he, in direct violation of the rules of said receivers then in force and known to him, left the baggage car in said passenger train, where it was his duty to be, and went into the express car of said train, which was in the possession and under the control of the agent of the Southern Express Company, either for the purpose of assisting said express agent in the discharge of his duties or for some other purpose in nowise connected with the duties of the plaintiff's employment, and while in said express car was injured by the derailment thereof as the result of the collision of said passenger and freight trains; but for which negligence and wrongful conduct on the plaintiff's part in leaving said baggage car in violation of the rules of his said employers and going into the express car for the purpose aforesaid, he would not have been injured.

Having fully answered, this defendant prays that the plaintiff take nothing by its said action and be permitted to go without day, with its costs.

WALTER H. NEAL,
U. L. SPENCE,
Attorneys for the Defendants.

Verification waived.

DOUGLASS & LYON,
Of Counsel for Plaintiff.

And thereupon, at the regular term of the Superior Court of Moore County, aforesaid, with the said Honorable C. C. Lyon, Judge, presiding, this cause coming on for trial, the following jurors, to-wit, M. O. McIver and eleven others, were chosen, tried, sworn and impaneled to try the issues joined between the parties; and thereupon, after the charge of the Court, said jurors 16 heretofore impaneled in this case, for their verdict found the issues submitted to them as follows:

Issues.

(Title of Cause.)

1. Was the plaintiff injured by the negligence of the defendant?
Answer. Yes.

2. Was the plaintiff's injury caused by his contributory negligence?

Answer. No.

3. What damages is the plaintiff entitled to recover?

Answer. \$30,000.

And thereupon motions and orders were made and, by direction of the Court, entered upon the minutes of the proceedings of the Court, in words and figures as follows:

(Title of Cause.)

Motion for new trial for errors to be assigned in case on appeal. Motion overruled. Defendant excepts. Judgment as set out in the record, to which the defendant excepts and appeals to the Supreme Court. Notice of appeal given and waived in open court. Appeal bond in the sum of fifty dollars adjudged sufficient. By consent, appellant has twenty days to serve case on appeal, and appellee fifteen days thereafter to serve counter-case or exceptions. Execution not to issue within fifteen days.

And thereupon, on motion of the plaintiff, the Court rendered judgment in said cause, in words and figures following, to-wit:

Judgment.

NORTH CAROLINA,
Moore County:

In the Superior Court, January Term, 1910.

(Title of Cause.)

This cause coming on to be heard before the undersigned judge, and a jury, and being heard, and the following issues having been submitted to the jury, viz.:

- 17 1. Was the plaintiff injured by the negligence of the defendant?
2. Was the plaintiff's injury caused by his contributory negligence?
3. What damage is the plaintiff entitled to recover?

And the jury having answered the first issue "Yes" and the second issue "No," and the third issue "\$30,000":

Now, therefore, on motion of Douglass & Lyon and H. F. Seawell, attorneys for the plaintiff, it is ordered and adjudged that the plaintiff recover of the defendant the sum of thirty thousand dollars and interest on said sum from the 24th day of January, 1910 (it being the first day of the term), until paid, and the costs of this action, to be taxed by the clerk.

C. C. LYON,
Judge Presiding.

And thereafter the case on appeal to the Supreme Court, as settled by the judge, upon disagreement of counsel, was filed in said cause, the same being in words and figures following, to-wit:

Case on Appeal.

STATE OF NORTH CAROLINA,
County of Moore:

In the Superior Court, January Term, 1910.

E. N. DUVALL, Plaintiff,
against
SEABOARD AIR LINE RAILWAY, Defendant.

This was a civil action, instituted by plaintiff, and tried under the Employers' Liability Act, passed by the Congress of the United States on the 22d day of April, 1908, to recover damages for personal injuries sustained by him on the 13th day of March, 1909, as the result of the collision of the passenger train upon which he 18 alleges he was acting as baggage master, and a freight train, near Sanford, N. C.

ERNEST N. DUVALL, the plaintiff, being sworn, says:

I live in Portsmouth. On March 12th and 13th, 1909, was employee as baggage master and flagman for the Seaboard Air Line Railway; employed by superintendent—think his name is Shea. He is now superintendent of the second division.

Q. What were your duties, Ernest, as flagman and baggage master?

By DEFENDANT'S COUNSEL:

Q. Were your duties set forth in the rules of the receivers of the defendant?

A. Yes.

Q. Did you have copy of these rules in your possession at the time of injury?

A. Yes.

(Defendant's counsel then offered to furnish the witness a copy of said rules, which offer was declined.)

(The defendant objects to the witness giving oral testimony as to his duties, when it appears that the same are set forth in the rules of the receivers of the defendant, which rules are in Court and subject to his use; overruled; defendant excepts, which is defendant's first exception.)

Exception No. 1.

A. To handle all baggage that was entrusted to my car, all the company's mail; to look after the comfort of the passengers on the train, and prevent anyone from riding free. I was under the conductor's orders and had to obey his orders, as he will so state; and to look after the United States mail—all that was put in my car. We were compelled to carry it to the postal car and deliver it to them. With respect to my car, the postal car was first in the train; my car was third; had to go through express car to get from my car to the

19 postal car. There was a partition in the baggage car. I carried my baggage to the head end; didn't carry all my baggage at all times in the baggage car. We also used express car as baggage car; in fact until recently, we had not put on a baggage car; had been using the express car as a baggage car. Left Portsmouth on the 12th, coming south; left at 9 o'clock, on schedule time; left on train No. 33, passenger train; had a postal car in front, then the express car, and then my car, a first-class car and sleeper. Baggage car was used as a combination car. Postal car was cut off at Norlina, and that left me the express car, the combination car, first-class car and sleeper. In front part of combination car we carried baggage; the rear was for colored passengers. The car back of that was for white passengers, and the one back of that was a sleeper. Conductor on that occasion was Capt. Cox—W. T. Cox. He is here now. Left Portsmouth about 9 o'clock; got in the neighborhood of the wreck about 4:40 next morning. Nothing unusual happened from the time we left Portsmouth until we reached that point.

Q. State whether or not this baggage that you speak of being often carried in the express car was known to the officers of the road, of your own knowledge.

By HIS HONOR: Do you know that, of your own knowledge?

A. Yes; I know it.

(Defendant objects to evidence as to what was done at any other time, and asks that the evidence be confined to what was done on the night of the injury; objection overruled; defendant excepts, which is defendant's second exception.)

Exception No. 2.

A. Yes, sir; they knew it. Yes, the conductor knew it. Don't remember whether I had any baggage in express car that particular night or not. We always used the express car for through baggage, to save transferring it at Hamlet. Were directed to do so by those in charge. Everything, up to the time of the wreck, went very smoothly; don't recall anything unusual. Some time after

leaving Raleigh, Mr. Rowe, the messenger on my car, * * *
20 I don't remember just how many stations we had passed, nor just how long before the wreck it was; think something like twenty or thirty minutes. Mr. Rowe asked where the conductor was. I said, "In train, collecting tickets." He said, "Tell him to come up in my car," and I said, "All right; when he comes up, I will." When the conductor came to my car I told him what the messenger said. He said, "All right; let's go see what he wants," to me. He put his tickets up in the pigeon hole and went on. I had to stop to lock the door. I always lock the door as I go out. I picked up my lantern and started, and just as I got about ten feet in his car—I don't remember saying a word previous to the accident, I think Mr. Rowe was sitting down on his box; am not certain about that. The crash threw me over completely; turned me over, and I was carried through space—can't say how. I landed down, with a lot of stuff piled on top of me. I tried to free myself and could not. I began to think I was going to die. In a few minutes another crash

came; this time it landed me on my head completely, with my feet pinned back in this position, and this stuff piled on top of me—tubs of oysters, boxes of fish and any amount of whiskey in packages, and a whole lot of heavy stuff that was piled in the car. I began to think I was going to die, and tried to call for help, but couldn't speak at first. I tried to unloose myself, but found that I was pinned down. After trying to free myself, I did get my neck up, so I could breathe. The whiskey was flowing over me so I was about to strangle. I put my hand over my face to keep it from going up my nostrils. I thought the car was going to catch fire, and knew I would be burned alive. I made a desperate effort to get loose, but my back gave me so much pain that I can't remember much that happened after that, and I gave up completely. After I got my head loose I began to holler. That was some time after I had gotten underneath there. I didn't hear anyone. Mr. Rowe said, "Ernest, be quiet; the people are coming to help you," and I said, "For God's sake, tell them to hurry; I can't stand it long in this position." I said, "Please tell them to come; I can't see anything, and am suffering awful pain." He said, "They are

21 coming; I see them now." After that I don't remember how long it was before they got to me. They got me out and sat me on the edge of the car that was open, I presume. I thought if they moved me again I would die. I asked them to go away and leave me. The porter said, "You are hurt badly." I said, "Just leave me alone." Mr. _____ said, "Come and help me get this man out of here." They covered me up and carried me out in the field. Can't say how long I stayed there in the rain—until I was unconscious. In falling, received about fifty cuts on my back, arms and head; also got a broken back, a broken leg and was strained and bruised all over. Don't think of anything else except as to my mental suffering. Yes, I couldn't speak, because of my throat. It was bruised with a stick pin which had bent and turned down and stuck in my throat. I was trying to scramble and get my head out, that way. My throat was bruised and swelled up, in the hospital; couldn't eat on account of it. Stayed in hospital at Sanford about ten days; then they carried me to Portsmouth, to the King's Daughters' Hospital. The company sent me down there. Dr. Holliday attended me there. He is surgeon for the S. A. L. Railway. After that, I went over to Dr. Hunter's office for an X-ray examination of my back. After that, I was sent to Baltimore to consult some specialists in regard to my back; stayed a day and night. They brought me back and I came home. Didn't come to the hospital immediately then. It was nearly two weeks after I came back. Stayed at the hospital about a month this time and then came back home. Been there ever since. Since I was hurt all along I have suffered death itself. Suffering pain right now; it is about to kill me. Suffer all the time. During X-Ray examination and also the other examinations it was very painful and I suffered more than I want to again. Yes, I think I suffer as much now as I did directly after I was hurt. Can't say that the pain is altogether as hard as it was for the first three weeks. I think it is more now than it was for the first week.

It continues to grow worse, and for the last month it has been
22 giving me exceeding trouble. Can't sit down long and can't
walk to amount to anything; can't take any exercise. It
breaks me down. If I lie still I get so stiff I can't get up. Just suf-
fer, suffer constantly; can't find any ease any way, and no one to
give me any. Went to Dr. Hunter's office for the X-Ray exami-
nation after I came home. He is an X-Ray specialist in Norfolk.
Has an office on Granby street. Also went to the St. Christopher's
Hospital, on Free Mason street. Dr. Gwathney is proprietor of that
hospital. He is here. He made examinations of me. Has been to
see me a number of times in my home. I have been to his office
once. Besides Dr. Gwathney and Dr. Holliday I have been attended
by Dr. Pope. He is present. As to the mental suffering which I
have undergone my thinking faculty is not as good as it was and my
nervous state is a wreck. I am no good for anything; can't concentrate
my mind on anything for long and can't remember things. It
has got me so that I don't think of anything but my injuries. It is
about to worry me to death. Yes, my leg was broken. Can't say
that I have suffered any pain with my leg. No feeling in my legs
at all; absolutely none. My leg was set after I arrived at the hos-
pital at Sanford. The setting of the broken leg gave me no pain. I
was conscious of their doing it though. It has never bothered me
any at all. After I got back to Norfolk the surgeon for the S. A. L.
Railway, Dr. Holliday, had me in charge. He made examinations
of my leg. No, it gave me no pain. Dr. Holliday asked me if it
hurt. I told him it did not. They put the cast on at Sanford—Drs.
Monroe, McIver and his brother, Dr. Jno. Monroe—and I kept com-
plaining of my back a great deal. They examined my back as they
did my leg, and all. I remember Dr. Monroe picked up my leg and said,
"He has got a broken leg, too." He set my leg, and when he
was pulling my leg it hurt my back a great deal. I told him it was
my back that was giving me trouble. While he was making the
examination it was very sensitive. He said, "You have got a very
badly strained back." That was Dr. Bert. Monroe. Dr. Jno. Mon-
roe set my leg. Don't remember who it was made the decla-
23 ration about my strained back. Think it was all of them.
They were all there in conference with the surgeon of the
S. A. L. Railway. It was known to me that all of them decided that
I had a strained back.

(Defendant objects. Evidence ordered stricken out.)

In Norfolk Dr. Holliday examined my limb in the cast and the
next morning examined my back, and I asked him what was the mat-
ter with my back, and he didn't say anything. He never has told
me. The first intimation Dr. Holliday gave me at all that my back
was broken was three months after I was injured, as near as I can
come to it. Think it was a little over three months.

(Defendant asks for the purpose of this testimony. Plaintiff
wishes to show that at the time he found his back was broken it was
too late for an operation.)

Am willing for Dr. Gwathney to make a personal examination of

me before the jury. Yes, I will try to stand it. Have gone through a great deal and am willing to stand it again. Had been in employ of the Seaboard about seven years at the time I was injured; nearly seven. Was averaging about \$50 a month.

Q. State to the jury if at the time you were injured you were paying attentions to any young lady, young woman, and if you were engaged to be married to any young woman?

(Defendant objects. Question withdrawn.)

No, am not a married man. Never been married.

Q. You can state whether or not you were in line of promotion in your business, in the service of the company?

(Defendant objects. Question withdrawn.)

Yes, I can show the jury how the circulation is in my legs. Have no feeling in them at all. Do not feel the puncture of the needle at all. There is the blood from it.

Cross-examination by Mr. CANSLER:

Yes, was baggage master and flagman on that train. Don't remember just how much baggage was in the car at the time I was injured. Something like 15 or 18 pieces. Have no distinct 24 recollection about that. As to its location, I remember I had a big hat trunk sitting in the door. That was to come off at Sanford; and think I had two heavy shoe trunks on the other side. I stacked the baggage, what is known as the through stuff, so I wouldn't have to handle it any more. That was stacked on either side of the door to leave an aisle through. I had it stacked on either side, but can't say as to the number of pieces. The baggage was stacked in the end of the car next the express car. The door on the side was not about the middle of the baggage car but about the middle of the whole car. I would say that the door was about six or seven feet from the partition between the baggage and the colored department. Had no baggage stacked between this door and the partition. There was a stove on one side, and I used two boxes, known as the train box and the conductor's box, for jacks and levers, etc., on the other. Can't say which side of car I was thrown out on. Don't know which side of the road it was. Yes, the stove was on one side of the baggage car, the left-hand side coming south. On the other side were two heavy boxes, the opposite side. These were underneath the pigeon holes which I used as my desk. These boxes were used for conductor's supplies, brasses, jacks, levers, etc. They had lids to them. We never locked the top box because we constantly have to use it. One was sitting on top of the other. Had to remove the top one to use the underneath one. The brasses were not fastened to the box; they were loose. As to the size of the boxes in feet, I would say about four feet long, probably a little longer. The conductor's box is about one and one-half feet deep and a little over two feet wide. In that box we kept markers, flags, oil, lanterns, extra lantern globes and other supplies used by the flagman. That sat on top of the

porter's box, which was heavier than the conductor's. The bottom box contained brasses, etc. The length of that is practically the same as the other, but not quite as thick as the conductor's. Between the side door and the passenger compartment of that car, not occupied by the boxes and the stove, that night, to my best knowl-

25 edge, there was a bag mail, known as the Charlotte mail, to be transferred at Monroe; also my coat, hat and grip, I think, underneath possibly the cheek grip. The pigeon holes used as my desk were just over the boxes. That is where I did my writing. Had no stool; usually stand up when running. If I did sit down it was on the boxes. Don't know how many feet from side door of car to the front end of it. Don't know how long a passenger car is, but presume it is about halfway the length of a passenger car from the partition up to the front end. Would say there is something like a space of 30 or 40 feet from the door to the front end of the car. Yes, all the space from the side door to the front end of the car was occupied with baggage. There was just simply an aisle between. We used that for the purpose of going back and forth between the cars. I had just gotten into the express car when the collision occurred. Don't remember how I was thrown. It was by the first crash, though. I was just flying; can't remember which way; but I remember this debris on top of me and all around me, and then I began to think that I was dead and tried to get up. As to what was on me after the collision and after the second crash—between the first and second crash—I can't say. I said boxes of fish and tubs of oysters that we carried in the express car. My head was down and I was trying to save myself from strangling to death. Yes, I remember a tub of oysters falling down across me once, and stuff piled up here on my breast. There was a lot of smoke, and I think my feet were loose. Can't say what I fell on. These objects that were on me weighed down on me heavily. I thought if I had as much as five pounds more on my feet that I couldn't stand the pressure that was pulling me back on my back. After the first crash the second crash came immediately, before I could collect my thoughts. Yes, the second crash piled more on me; that is what piled the stuff on me, the second crash. There was stuff piled all over me. The crashes were so close together that I can't say how it was. Don't know how to determine how much express there was in the car

26 that night; it was an extra heavy night. After I was taken out of the wreck I was put in the field and then lost consciousness. Don't remember much about it. I would regain consciousness and lose it, and then I couldn't remember where I was.

The wreck occurred at about 4:40 a. m., between 4:30, 4:40 and 4:50. It was some time after leaving Raleigh that the express messenger asked me to speak to the conductor for him. He came to me after we had passed a station or two; came to my car and asked me where the conductor was. Yes, I stated that my duties are set forth in a book of rules. I then had a book of rules of the company in my possession. Those rules correctly set forth what my duties were. Yes, I think the copy you hand me is similar to the one I had. It is page 80 of that rule book that sets forth my duties.

Yes, I was carried to the hospital at Sanford and was treated there. Was there about ten days. Was treated by both Doctors Monroe and by Dr. McIver. Think Dr. Jno. Monroe came more than any other; I mean the large gentleman. Think he came more than the rest of them, but can't be certain. Yes, the doctor who is standing up in courtroom is the one who came most of the time. He came most every day. I stated to him my symptoms as accurately as I knew. Told him how I suffered and how I was injured, as well as I could. Can't say that I suffered as much while in the hospital as I did after leaving there. After I was in Portsmouth I began to suffer a great deal. I had suffered a great deal of pain while in the hospital at Sanford, and they had to give me morphine a number of times before I could rest at night. I have gotten quite accustomed to pain. I suffer quite a great deal now that I have to endure. As to comparing my suffering at Sanford and after I left there, I suffered more excruciating pain at the hospital at Norfolk, but since I have left there I have pain that stays with me. It would come and go while I was there, and at times I would feel comparatively free. When I was at Portsmouth and they told me to get up and roll around I began to suffer more. Don't know how long it was after I got to Portsmouth that my suffering began to appreciably increase. I have been suffering ever

27 since I have been at Portsmouth. I remember before I was

out of bed that my back gave me a great deal of trouble. I didn't stay in bed in Portsmouth but a little over a month, I think. No, I can't tell you when my suffering got noticeably greater after leaving Sanford. Staid in bed in the hospital in Portsmouth about a month or a month and a half before I got up at all. After a certain time I got out of bed and got to rolling around in a rolling chair. The doctor said I ought to be able with my broken limb to roll about. They picked me up with a great amount of pain and put me in a reclining chair, and I rolled about for a number of weeks. They used to roll me home and back again. I lived near the hospital. I never staid all night at home. I think I only spent one day at home and that was one Sunday. Can't say how long they rolled me back and forth to my home before my back began to pain so intensely that they applied the X-Ray. It pained me all the time. The pain is about at a standstill now. It just pains all the time and I don't know how to determine how the pain is. It has been at a standstill probably two or three months. I have suffered all the time. First had the X-Ray applied about three months, nearly four months after the injury. Before that Dr. Holliday took me over to see Dr. Hunter, the X-Ray specialist. That was between three and four months after the injury. Coming back in the carriage with Dr. Holliday from that examination I asked what he thought of my case now, and he said, "I advise you to be operated on." That was all he said. I didn't tell him whether I would or would not. He said the operation was a serious one and that he couldn't foretell the result of it. I asked if there was any further method he could use before an operation, and he said I could try a cast, but I didn't think it would do any good. He said he would advise that I be operated on.

I didn't tell him I would or would not. About two weeks after that he carried me to Baltimore, and there the X-Ray was again applied. Dr. Holliday again advised that I be operated on, but the doctor that examined me in Baltimore did not so advise. Yes, Dr. Holliday said he would advise an operation, after the examination in Baltimore, but he told me that the doctors that he carried me to there advised against it. I have a statement to that effect. I did not agree to submit to the operation. Yes, I think one of the effects of my injury has been to impair my memory. I can't concentrate my mind as well as I did before. No, I think my memory is not as good as it was before. Yes, I stated on direct examination that the mail car was dropped at Norlina. We had no United States mail car in the train at the time of the wreck. We have no instructions to the effect that when there is no mail car the mail shall be carried in the baggage car. I don't remember whether we had any mail in there that night or not. There was a mail pouch but that was railroad mail. No, there was no mail car on the train at the time of the wreck. Mr. Cox, the conductor, went into the express car that night just before the wreck. Can't say what he did when he got in. I had not sat down. Had just got about ten feet into the car. I stopped to close and lock my door and he went in ahead of me.

Redirect examination:

Coming from the colored department from the end door on the right-hand side of my car there were two heavy boxes; also this rack, with the pigeon holes which I used for my desk. There were no trunks, I think. There were grips and my overcoat and a mail bag. On the other side was the big stuff that is usually in the car. There was no fire in the stove. We used steam heat. Yes, the car was cut about half in two. Don't remember the length of the baggage car, but this door was about the center of the car, six or seven feet from the partition. On the other side we have a door here (indicating), in the center of the whole car. From this door to the front end of the car there was baggage on both sides, trunks over here on the right. At the time of the injury I was 25 years old. The condition of my health was perfect. Don't remember any sickness I had had for a long time.

29 Dr. LOMAX GWATHNEY, witness for plaintiff, being sworn,
says:

Have lived in Norfolk all my life. Am a physician and surgeon; principally surgeon. Graduated first at University of Virginia in 1889, and at Columbia University, in New York, in 1890; was at Mt. Sinai Hospital for two years, and in Europe, Vienna and Heidelberg for — months. I have seen a considerable number of spinal injuries. During the past two years we have operated on four or five spinal injury cases and seen two or three which were not operated on on account of the severity of the injury. I am co-proprietor with Dr. Ruffin of St. Christopher's Hospital. I also attend the other hospitals. I do practically nothing except surgery at the

present time. In explaining the difference between the nature of injury to spinal cord proper and an injury to the nerves outside of the cord proper, will say there is a great difference in the cord proper and in the brain or nerve fibers. The latter have only sheaths or covering of a certain type and limitations. If injured they are permanently injured and will not reform. The nerves outside of the spinal cord have this extra sheath and will regenerate if they are properly divided and properly rejoined. Those in the brain will not if they are severed or crushed. I mean to state that there is a very distinct brain cord and an injury to the brain is more often permanent, whereas nerves outside of the brain or cord may regenerate and regain their functions.

Q. What are the probable results in regard to injuries to the spinal cord?

(Defendant objects.)

By his Honor: Can you undertake to say that there is any definite or certain result from injury to the spinal cord?

A. Yes, sir.

(Objection overruled; Defendant excepts, which is defendant's third exception.)

Exception No. 3.

30 A. Paralysis, partial or complete.

Q. Can you state at what time in your opinion operations should be performed for the relief of injuries to the spinal cord?

(Defendant objects; overruled; defendant excepts, which is defendant's fourth exception.)

Exception No. 4.

A. Your Honor, the question is rather a broad one and I will have to answer it somewhat in detail. Injuries which may cause or have caused a complete severance of the cord, in which there is a complete severance of the cord, it is useless to operate at all. Where there are pressure symptoms and we suspect partial injury to the cord early operation should be undertaken before the pressure has caused a change or degeneration and the formation of scar tissue in the fibers which prevent their performing their functions. We can say that where operation is undertaken at all it should be undertaken with considerable promptitude, that is, in as short time as the condition of the patient will permit, as soon as the first shock of the injury and the depression which follows it are past. Yes, I have had occasion to examine young Ernest Duvall, the plaintiff. I saw him first with Dr. Hope at his (plaintiff's) home in September of last year, I think, 1909, and I have seen him once or twice since at his home and in my office. I have examined him as carefully as I could and would in an ordinary consultation for surgical purposes, so as to advise as to the wisdom of an operation. Yes, an X-ray picture has been taken of his spine under my direction. That was last week. I have the picture here.

Yes, in my opinion, that would show the condition of the young

man; it would show with some definiteness fractures, though not always.

Q. I will ask you this question. From your examinations, made as you state, and from the X-ray negative, which you have had taken as you state, whether you can form an opinion as to his condition satisfactorily to yourself?

31 (Defendant objects; overruled; defendant excepts.)

A. Reasonably so.

Q. Then will you please state in your opinion what the injuries are in this case and your reasons for so stating?

(Defendant objects; overruled; defendant excepts.)

By his HONOR:

Q. Did you make the negative?

A. I did not. It was made under my direction by the same man who makes all the negatives.

(By PLAINTIFF'S COUNSEL:)

Q. Do you know that this is the negative which you had made?

A. Yes, sir.

(By his HONOR:)

Q. Did you see the picture taken?

A. I did not.

(PLAINTIFF'S COUNSEL:)

Q. Do you know that this is the picture taken of this young man by the X-ray?

A. I did not see it taken.

(Objection sustained; plaintiff excepts.)

Q. State from your connection with this case, your examinations made, what in your opinion are the injuries, and give your reasons for so stating?

(Defendant objects. Question withdrawn.)

Exception No. 5.

Q. State from your examinations made of this man what in your opinion is the cause of his trouble?

(Defendant objects; overruled; defendant excepts.)

(By his HONOR:)

Q. In expressing your opinion as to his condition you must not let what you know as to the X-ray influence your opinion.

A. I think I can do that entirely candidly and with an open mind, and still give an opinion as though I had never seen the X-ray photograph. This man had an injury to his backbone, the spinal, bony column, which caused pressure and a severance of certain fibers in his cord, producing the condition of partial paralysis

in his legs and a loss of sensation from the junction of his middle and upper third of his thigh downward, including the feet.
32 He is incapable of walking or using his lower limbs except in a very spastic fashion, jerky, and is unable to stand unsupported.

(Defendant requests that the answer to this question be stricken out as not being responsive to the question; request overruled; defendant excepts, which is defendant's fifth exception.)

Exception No. 5.

As to my opinion in regard to the effect of an operation at this time. I fear after the lapse of time that the degenerative changes which have taken place and from a history of the character and nature of the symptoms now in evidence, that any operative procedure would only give a faint hope of partial relief. As to the operation being dangerous to his life or not, all operations on the spinal cord are dangerous to life. If an operation should have been performed at all it should, in my opinion, have been performed within ten days of his injury. Operations on the spinal cord are so dangerous because of the production of meningitis from infection of the cord from different parts of the body, which is fatal.

Q. I wish you would state from your examination in this case, your knowledge of it acquired from your examination of the patient, whether or not you consider this case one of permanent injury, either with or without operation?

(Defendant objects; overruled; defendant excepts, which is defendant's sixth exception.)

Exception No. 6.

A. I do consider his injuries permanent, with or without an operation.

Q. Will you please state, in your opinion, what would be his condition, with the most favorable results that could be anticipated, under an operation?

A. A relief of some of his pain, very little relief of his 33 paralytic symptoms. I advised him to be operated on, frankly stating that to him in the first instance.

Q. State, doctor, what effect, if you know, from your examination of this patient, this injury has had upon his nerves?

A. Well the boy has suffered very greatly, and suffering of course will make an individual depressed and upset, and abnormal from a general nervous point of view.

(Defendant requests that this answer be stricken out as not being responsive to the question; overruled; defendant excepts, which is the defendant's seventh exception.)

Exception No. 7.

Q. From your examination of this case what, in your opinion, is the outlook of the case or hope of recovery to any extent?

A. I have already answered that.

(Question withdrawn.)

Cross-examination:

My opinion that the plaintiff is suffering from an injury to his spine is based upon the condition of anesthesia, a spastic condition of his muscles and his reflexes; that is, his inability to use his legs and the lack of sensation in his skin. That is anesthesia. An excessive sensation of the zone around the waist; the jerky, spastic, contracted condition of his muscles and the variance in his reflexes or knee-jerk, and other reflexes in the sole of his foot and ankles.

Q. Is that an unfavorable sign of the injury to the motary nerve?

A. The knee reflexes is of great significance in a great number of conditions. It is always an evidence of some derangement of the motor track somewhere. It is a reflex. * * * When you hit the knee here and the toe goes up in response that indicates a normal condition. When it is excessive it indicates an interruption in the spinal cord somewhere of the controlling influence from

34 above. When you hit the patella and there is no visible result

from it that indicates a change in the motor nerve, in the sensory nerve, or a change in the exact center from which the reflex emanates. In men that are perfectly normal when you hit the patella there is always a response, if it is done with medical skill. That is not, however, an infallible test. It varies. I base my opinion as to the condition of the plaintiff upon a purely external examination and the exhibition of symptoms on his part, and I assume from the exhibition of those symptoms and the history of the case that he is in the condition that I have described. Yes, I know that there is something the matter with the plaintiff's spinal cord as nearly as I know anything in the world.

Q. If, however, the plaintiff had been a nervous wreck before and had imagined that he had these troubles, and had given you these symptoms, you might have been deceived by them, mightn't you?

A. I think not. There are other tests we make in which we have these conditions of nerves, similar to those applied to this man, and found absent.

Q. Is it your opinion that the original injury was to the spinal column as distinguished from the cord?

A. I think it was to both.

Q. Suppose the jury should find from the evidence in the case, when it is concluded, that, say for some ten days after this injury, the plaintiff did not exhibit any of the symptoms that you have discovered and described to the jury, what would be your opinion as to the original cause of the injury, the present injury?

A. It would be quite possible that he would not have the same grouping of symptoms that he now has.

Q. Suppose he didn't show any of the symptoms that he now has what, in that case, would be your opinion?

A. He tells me that he had no pain in the handling of his leg. That would be proof positive that he did have symptoms.

Q. Suppose for ten days after his injury he didn't exhibit any of the symptoms that you have discovered and described to the jury, what would be your opinion as to the original cause of the injury?

35 (Plaintiff objects; sustained. Question ordered stricken out.)

—. Can't say how severe a blow was necessary to cause this injury to the spinal cord and column that I have given as my opinion he is suffering from. It depends entirely upon the direction and the force and the condition of the muscular action and resistance. A very slight injury might cause it. I think, however, it is probable, as in most spinal troubles of this sort, that the force was very severe I have seen men break their necks from their own muscular action. There would not, of necessity, have been any outward signs on the surface from the blow. I said that this operation should have been performed as soon after the injury was inflicted as possible. I say that the concensus of opinion is, in my opinion, that the relief of pressure on the nerve should be undertaken before the changes which the pressure might have caused should occur. Yes, I made physical examination of the plaintiff to see if I could tell by feeling of the spinal column whether any injury had occurred. It is impossible to state now whether I discovered any. And there is no other way for a physician to have discovered what his condition was other than the symptoms which he exhibited. If those symptoms were entirely absent for the first ten days after the accident then there would have been no evidence to lead a physician to conclude that he had suffered any spinal trouble, not if the examination was careful and properly made by a competent man. I said it is possible he might have sustained this injury to the spinal column to a degree and the symptoms may not have developed for ten days or more after the injury, and I think it is improbable. I think that by a proper diagnosis that the injury he sustained should have been discovered within ten days after the injury, or recognized. And I say that, in my opinion, if it was not recognized in less than ten days, it was because proper and careful diagnosis and examinations had not been made.

Q. Suppose, as a matter of fact, that the most thorough and careful diagnosis had been made, say for a month after his injury, at proper intervals, and no symptoms that you have described 36 and discovered appeared, what would your opinion be then?

A. That is controverted by the condition, which he states positively, that the setting of his broken leg did not hurt him.

Q. Leaving Mr. Duvall's evidence out of the case and the history of the case as you have given it, assuming that for a month after the injury, under proper and careful diagnosis, he did not exhibit any of the symptoms which you have discovered, what would be your opinion then?

(Plaintiff objects; sustained; defendant excepts. Question withdrawn for the convenience of the doctor, an expert witness, who is pressed for time.)

—. I said within the past year we have had probably half a dozen cases of spinal injury, with paralytic symptoms. We have one in the hospital now. Of those in the higher cord, in the neck, two have died; one with the injury in the upper spinal region died after

eight or ten months, as they all do, and one which I have in the middle of the spinal region is paralyzed from there down, and the outlook is sure, we think, that it will succumb in eight or ten months. It is hard to get a case just like this. The lower the injury to the cord the less the danger. I think this injury involves the cord proper. I have never taken an X-ray examination, but from the symptoms I would take it that it is. Yes, I advised plaintiff to submit himself to an operation, with the understanding of the amount of hope which I have stated it held out to him. My opinion was that there was a chance to relieve him to some extent. If he had been operated on as soon as by proper diagnosis the trouble could have been discovered, in my opinion, I don't think he could have been relieved entirely, though I think his opportunities for relief would have been very much improved. As to whether that would have been more dangerous than usual, more severe, I will say that all operations on the human body are more or less dangerous, but this is more dangerous than others. In my opinion there are few others more dangerous than this. Notwithstanding the fact that I consider it a more dangerous operation than the average I advised him to submit to it. If he could have been operated on at 37 that time, as soon as it could have been discovered by proper diagnosis and proper operation, in my opinion his opportunities for relief would have been greater. I first saw the plaintiff as a patient in September, 1909. I have just seen and examined him from time to time since then. I was called in as a surgeon for my advisee. I am a special surgeon and was called in for my opinion as to an operation. I was not asked to operate but for my opinion. I gave it and they did not act upon it. Yes, I am a resident of Norfolk, Va.

Redirect examination:

Q. I believe Mr. Cansler asked you if you advised the physician that an operation was the best thing?

(Defendant objects; overruled.)

Q. What did you state in reference to an operation?

(Defendant objects; sustained; plaintiff excepts.)

Q. What did you advise the attending physician?

(Defendant objects.)

By his HONOR: If it was at the same time that he was called in, in consultation, the witness may state what he advised the physician.

(Defendant objects; overruled; defendant excepts, which is defendant's eighth exception.)

Exception No. 8.

A. I advised an operation, with the hope of relieving part of his condition, particularly his suffering, or part of it, stating that I did not hope for or expect a relief of the complete condition.

The Court here took a recess until Friday morning at 9:30 o'clock.

Dr. GWATHNEY further testifies (the plaintiff is here examined before the jury):

Dr. G. says: Here is a spastic condition which you can see from the left side. It is the cause of this hurt. This condition 38 is one of partial paralysis. This point in the man's body has no sensation in it. As the nerves emerge from the spinal cord he has an area of sensation around this way, what is known as parra-anesthesia. Where the nerves emerge we have this area. The body up here is about normal. He had a fracture of this part of the backbone, about the third or the fourth vertebrae. He was not complaining so much in his leg then. The paralysis was not complete. He could bear some weight on his left leg, and this is the way he gets out on his crutches. His right leg is entirely paralyzed. He is not able to have an erection, nor has he had one since the injury. He has had no erection at all.

Capt. W. T. COX, witness for plaintiff, being sworn, says:

Am now living in Raleigh. In March of last year was living in Portsmouth, Va. Was engaged as passenger conductor for the Seaboard Railway. Been in the employ of that company for fourteen or fifteen years. Been a passenger conductor five or six years. About the 12th of March, 1909, I was conductor on 32 and 33, between Portsmouth and Monroe. No. 33 left Portsmouth on March 12th. It consisted of a Postal U. S. mail car, an express car, combination car used for baggage and colored passengers, and a first-class coach and sleeper; five cars in all. On leaving Portsmouth the U. S. mail car was next the engine, the express car next, the combination car for baggage and colored passengers next, first-class coach for white people next and then the sleeper last. The baggage end of the combination car was next the engine. We left Portsmouth at about 9 p. m. About 4:40 next morning we had reached a point just the other side of Colon. My crew consisted of engineer, fireman, express messenger, baggage master, flagman, porter and myself, the conductor. Besides the baggage master I had a train porter, John Hicks. I see him sitting over there now. Mr. Ernest Duvall, the plaintiff, was baggage master. The Seaboard doesn't furnish a flagman. They make the baggage master perform 39 those services. He was baggage master and flagman or brakeman; anything I wanted him to do. He was under my direction and control. I have known plaintiff eight or ten years. His general character is very good. He was one of the healthiest boys I ever knew. He was one of the strongest men I ever saw for his size, and very active. About 4:40 o'clock, on March 13th, just beyond Colon, we had a head-on collision down there with a freight train, and the cars turned over and buried everything under the wreck. Just before the wreck I went up to the front end of the train; had been in the rear end. Don't remember much about it. I went up to the front end of the train. I did a good deal of my work, writing, etc., in the baggage car. When I got up in the front end of the train the baggage master, Mr. Duvall, says to me, "the express messenger wants to see you in his car." I said, "well, come

on; go with me and see what he wants." The express messenger was Mr. William Rowe. I got about middle way of the car, as well as I remember, or had just sat down, or was in the act of sitting down, when this terrible crash came. Mr. Duvall was coming on behind me. Can't say that I saw Mr. Duvall just before the accident. He was behind me. After I told him to come with me I can't say whether I saw him or not. I was in front of him. I was in the act of sitting down when this—I don't know what it was—this terrible crash came, whirled me through the air somehow and buried me fast under the wreckage. I lay in there about an hour; seemed like a thousand years to me, but they finally got us out. I said, "Ernest, come over here and get some of this stuff off of me." He said, "Cap'n, I am pinned; I can't move." He never said anything more. I thought he was dead. Then they carried me over in a cornfield, as well as I can remember—seemed like a cornfield—and laid me flat of my back in the rain and I thought I would freeze.

(Defendant objects; sustained.)

The weather was cold and raining. When I was taken out of the wreck I observed wreck as I went by it. They carried me to the sleeper, and I noticed that there were two cars on the 40 track and the other two cars were tore all to pieces. The baggage car had telescoped the express car, and both turned over completely. The top of the express car and the top of the combination car were on the ground. They were bottom upwards. The wheels were gone—there was nothing of them; completely turned over. By "telescope" I mean one car crushing its way into another. The baggage car, I said, had gone into the express car. That was a pretty bad time around there and I can't say exactly how far it had gone in, but about a half or a third of the baggage car had gone into the express car, I should think.

In a little while they got me into a sleeper and the doctors came in there—

(Defendant objects; sustained.)

They carried Duvall to the hospital at Sanford. I did not see him there. Saw him before he went there. He was hollering with his back, saying he was about to die and he wished somebody would shoot him, and all like that. Kept hollering after they got him into the sleeper, and after a while the doctors got there and gave him a hypodermic of something, I suppose morphine, and after a while they got him resting easy. Yes, I was in same room with him at the hospital. He kept complaining after that of his back. Am not sure about when it was, but I know that he told me he would lose his legs at night and couldn't find them unless he would look down and see them. I don't know when he told Dr. Monroe that, Dr. Will Monroe, when they were putting the cast on, about four or five days after the accident I think it was, he complained to Dr. Monroe that his legs felt like they were dead. The reason I remember that is that we had a joke about it. I said, "well they smell like they are dead

to me, Ernest," and we all laughed about it. Yes, I know Dr. Burke when I see him. He is a surgeon for the Seaboard. I have known him a long time. He told me himself he was chief surgeon.

(Defendant objects.)

(By his HONOR:)

Q. Is that the only way you know it?

A. I am satisfied in my own mind that he is.

(Evidence ordered stricken out.)

41 Yes, I was present when Dr. Burke made an examination of young Duvall.

(Defendant objects; overruled.)

Q. Well state what happened?

(Defendant objects; question withdrawn.)

—. I stayed there in hospital at Sanford with Duvall nine or ten days. While there he complained of his back and gas on his stomach. His throat swelled up here. I believe he said a scarf pin stuck in it and bruised it. Complained of no other parts of his body. Of course he was cut up a little bit. He complained of his back mostly. Don't think I saw his broken leg set. Think I heard him say there was a hole cut in that broken leg. Didn't hear him say anything about the operation of setting his leg. Mine hurt me pretty bad and he said his didn't hurt him at all. He said his legs were dead. That is where we had the joke about it. Don't remember that he said anything about the operation of setting his leg. We got to Sanford on March 13th and left on the morning of the 22d. From there he went to Portsmouth. I went to. We were taken to the King's Daughters' Hospital, but not to the same room. I didn't see him while there at all until they got him in the rolling chair and brought him in my room to see me. I should say that was about a month after we got to the hospital in Portsmouth. I was still in bed. When I saw him there he still complained of his back, and complained of his water, that it would drip at times unconsciously. Yes, I know this of my own knowledge. It was soon after they commenced rolling him in my room. He would urinate in the urinal and it would have a settlement in the bottom, right muddy; right thick, an inch deep. Yes, he frequently came in my room after I had been there about a month. He was then complaining of his back. This was the particular trouble. No, he could not walk. Said he couldn't stand up; had no feeling in his legs. Yes, I had conversation with Dr. Holliday about his condition while I was in the hospital in bed there. Think it was soon after we went to the hospital; can't say just when.

42 Cross-examination:

Live in Portsmouth; vote there. Left there after October 7th. Suppose I have spent as much as three weeks there since that. Now

live in Raleigh. Not doing anything now. Yes, we had five cars in the train leaving Portsmouth the night of the wreck. We set the mail car off at Norlina about 1 o'clock. After that had only four cars left in the train.

(By consent Mr. Douglas asks the witness a question: Captain, I want to ask you in regard to the baggage. State where the baggage on your train was carried? A. Why it was carried in the baggage car and the express car.)

Defendant resumes: Yes, set the mail car off at Norlina about three hours before the collision. Then I had left in my train the express car, which stood next the tender of the engine, and next was the combination and baggage car, and they were next to the express car, and the compartment of the combination car for negro passengers was next to the baggage department, and then the day coach and then the sleeper. Don't remember how many passengers were on train that night. Yes, I made out report on the train. Made it out as we went along. As a rule I made out my conductor's report in the first seat in the colored car, the first seat towards the baggage end. That is where I did it as a rule. If the train was crowded I had to go in the baggage car, and did it in there. I couldn't inconvenience passengers. No, I was not making out my report at the time of the collision that night.

Q. And you said, I believe, to Mr. Douglas, that you went on back to the baggage car and told the baggage man, the plaintiff in this case, Duvall, come on and go up to the express car?

A. I didn't tell him that; I told him that when I went up to front end of train the baggage master told me the express messenger wanted to see me, and I said, "come on and let's go up there." No, I was not going in there to make out my conductor's report. Don't know whether there was any baggage in there that night. Don't remember how many pieces of baggage we had that night.

43 There were several trunks; I would say a dozen. I noticed the trunks but didn't lay any stress on them. I would say the car would hold—trunks as you get them—48 trunks; about that. Am not swearing that there was a dozen in there that night. That was the average run of baggage that night. We used to use one end of the express car for baggage. That was when we didn't have any baggage car. But for a man to be successful as a passenger conductor you have to take advantage of everything to make time. When you are going along and make a stop at a station, if the engineer were to stop the express car even with the baggage we would shove it through the express car without making any extra stop. We would save five minutes by not making a second stop there. The baggage man was at the door taking it in. It was nothing unusual to carry baggage in the express car; can't say whether there was any in there that night or not. No, we would not notify the engineer where to stop at the next station. He would stop where he thought it was best to take on the baggage. No, we didn't lose any time there. The car's length in handling the baggage would make much difference. Yes, when we got to the hospital at Sanford Duvall and I occupied the same room and Mr. Rowe occupied another. Mr.

Rowe rolled in there occasionally to see us. There were five or six nurses there. You rang a bell and the first one who heard it would come. As soon as she got through attending you she would retire. There was a considerable portion of the time that the nurse would not be actually in the room. Yes, Mr. Rowe was rolled in occasionally. Dr. Monroe rolled him in the first time. No, Duvall and I did not propose to Rowe, the express messenger, that we three should agree upon why Duvall and I were in the express car; did not propose to him that we should concoct a story that there was a robber on the express car and that was the reason we were in there. Something was said about that, but not that way. We did talk about why we were in the express car. Rowe told us at the hospital again about the noise on his ear, and he thought it might be a robber. We didn't

have to concoct any story as to why we were in the express
44 car. We were in there because he sent for us. Yes, I have

been taking a great deal of interest in this case. I am not sure whether I went on bond in the case or not. It was either Mr. Duvall or myself who went on the bond. No, you are mistaken about my going to Portsmouth and taking occasion to look into this matter. Yes, I was in Portsmouth last week and went to Mr. Rowe's house; Mr. Lyon, Mr. Duvall and myself. Got there about 8:30, as well as I remember. We went on the street car and got off about a block or so from his house. While we were talking to Mr. Rowe his brother would come in and go out. I suppose we stayed there ten or fifteen minutes. His brother was just running in and out of the room. They were putting the child to bed, he was sick.

Q. I ask you upon this occasion, Mr. Cox, if this conversation didn't occur, if you didn't ask Mr. Rowe if he couldn't come down here and testify as a witness in this case and fix up the tale that he thought there was a robber on that car and he sent for you to leave your post of duty and come up in the express car?

A. Not one word of it. Yes, I said something to him about coming down here as a witness. No, never been indicted. Yes, a man named Shaddock and myself have been tried. Don't know whether we were indicted for shooting a negro woman in Crowhole. It was a mess. I was passing there at the time but I wasn't in it at all. I was tried and acquitted. Don't know whether the grand jury found bill against me or not. I was acquitted. I am not sure whether I was formally put on trial or not. Would not say I was or was not. I was never in the courtroom but one time. Yes, I was tried for it and acquitted. It was nothing but a joke; I was not guilty. Yes, the grand jury thought little of the joke. No, there is no suit pending against me over in Lee County. Yes, a summons has been served on me from Lee County. The plaintiff was a woman by the name of Miss Nora Smith. I heard she was a young woman, a resident of Lee County, but I don't know it. No, there is no suit against me. A summons has been served on me. It said appear there on November 29th. No, I didn't go. I employed a lawyer. Don't

45 know whether complaint has been filed against me or not. Yes, Miss Nora Smith has sued me. I didn't settle it. The Judge threw it out of court and said there was nothing in it. Said

he wouldn't have anything like that in his court and threw it out. No, I was not there. I took my lawyer's word for it. He said it was thrown out of court. I haven't paid Mr. Douglas yet. We will get together on the costs. Not a cent has been paid on it. My lawyer had no instructions to pay her anything. He has not paid a penny that I know of.

Q. Now, Mr. Cox, I ask you if some time after this accident occurred if the Seaboard Air Line Railway didn't have to pay out the sum of \$1,200 on your account, on account of Miss Nora Smith's suit, alleging that you had made an indecent assault on her while she was a passenger on the train?

(Plaintiff objects; overruled; plaintiff excepts.)

A. No, sir, I don't know that. Don't know whether or not it was done. I have heard of it. No, I don't know the suit was brought.

Redirect examination:

Q. Captain, you were asked about a conversation had with Mr. Rowe, between you, Mr. Rowe, Mr. Lyon and Mr. Duvall. Tell that conversation, what you all said and what Rowe said?

A. Mr. Duvall, Mr. Lyon and myself went down there. We told him we wanted him to come and testify in the case. He said, "Gentlemen, I have no engagement to talk with you." He said, "No, that is all right; I presume you haven't your attorneys here; we understand you have entered suit." He didn't know whether he had entered suit or not. I said, "Don't you know whether you have sued the Seaboard Railroad or not?" He said, "Yes." I said, "I don't know whether my case is coming up or not; I only want you to tell the truth about this thing." He said he couldn't go until he had consulted his lawyers. Said he had employed Stedman &

Cook at Greensboro, and he said he couldn't go unless he got 46 their permission to go. Yes, I had a conversation with him

as to what did occur in the express car. I asked him, "William, I understand the Seaboard crowd is going to try to prove we were up there drinking or stealing whiskey, or something like that." He said, "It is a lie; there isn't a word of truth in it." He said, "there was nothing drunk on that car that night." Yes, that was stated in the presence of Mr. Lyon and Mr. Duvall. No, I don't think we had a conversation with Mr. Rowe at Sanford about our going up in the car. We were talking some about our injuries there. Yes, I was asked if I didn't try to make a plot about a hobo being on the train at Sanford; Rowe stated the reason he sent for us to come into the express car. He said he thought somebody got on his car and he heard a noise on the front end of the car. Hoboes frequently get on and ride the blind baggage. Rowe wasn't inclined to say very much at Portsmouth that night. He said there wasn't a word of truth in the whiskey business, if they are trying to prove it in court that we were in there drinking. I said, "You know you have never seen me take a drink of whiskey." He said, "No, I have not."

Q. You were asked about a suit brought against you by Miss Nora Smith. Were there charges that you made an improper proposal to Miss Nora Smith; what did she claim?

A. Yes. Mr. Sheat called me up in his office there one night. He is superintendent of the second division. He had charge of this Nora Smith business for the Seaboard.

(Defendant objects; sustained; plaintiff excepts.)

Yes, the affair was thoroughly investigated and I was exonerated and retained in my position. No, I do not know Nora Smith. Wouldn't say whether I have seen her or not. I wouldn't know her if she were to walk in here now. No, I never made any improper proposal or insulted any lady on or off of my train. She claimed that the improper assault was made on her in the drawing room of the second sleeper. She was carried through the first 47 sleeper into the drawing room of the second sleeper, and there the conductor made an improper proposal to her. This was on train No. 31. I had only one sleeper the night she claims the assault was made. I was not running No. 31; was running 33. Don't know at what point on the run she claims the proposition was made to her. Don't think I went into the sleeper any time that night between Sanford and Aberdeen. Don't think I did. Can't say.

Recross-examination:

Q. Capt. Cox, I think you said just now you didn't know anything about this suit. You said the railroad company exonerated you after a full investigation of it, and I asked you if they didn't pay \$1,200?

A. You didn't ask me that question. You asked me about this suit against the road. Mr. Stanley and Mr. Baldwin exonerated me of that and I kept on at work. No, after that they did not have to pay \$1,200. Yes, I have heard it. Yes, I have heard that the Seaboard Railway had to pay \$1,200 on account of that.

(Plaintiff objects to this question as hearsay; overruled; plaintiff excepts.)

Mr. Stanley can employ and discharge conductors if he wants it done right quick. I don't know what authority Mr. Stanley has got.

Q. He is just simply the claim agent?

A. I don't know.

(Plaintiff objects; overruled; plaintiff excepts.)

Plaintiff rests.

Mr. W. P. ROWE, witness for defendant, being sworn, says:

I was express messenger on the passenger train that was wrecked on the morning of the 13th of March, 1909. My duties as express

messenger were handling express, putting off, recording and delivering packages.

(Plaintiff objects to question and answer, and excepts.)

The route agent of the Southern Express Company employed me.

I had charge of the car I was in while en route. There
48 was no baggage in the express car the night of this wreck.

Yes, Mr. Duvall came into the car the night of the wreck. He first came in between Weldon and Portsmouth, in my car. Soon after leaving Raleigh he came in again; three or four minutes afterward, and was there when the wreck occurred. He was assisting me in checking the freight, express packages. The reason he came was we had a conversation when the train was standing at Johnston street station, Raleigh. I was standing in my express car door, on the right side. We spoke to one another, asked how we were getting along. I said, "I have a heavy run and am not yet through work." I asked him would he agree to come in and help me soon after leaving the station at Raleigh, and he agreed to do so and did come in. It was not long before the wreck that Mr. Cox came into my car; about ten minutes I will say. He remained there until the wreck occurred. I did not send for him that night. Did not tell Mr. Duvall to tell him to come in there. After Mr. Cox and Mr. Duvall came in, Mr. Duvall was helping me for a short while, four or five minutes, when Mr. Cox came in and we three took a drink of whiskey. At the exact time of the wreck I was recording waybills. I think Mr. Duvall was sitting or maybe standing on left-hand side of the car. He was not checking for me then. Don't know whether I was through checking or not, but I was through work for that time. I was recording freight. Had a pretty good run of freight that night. We always have a pretty good run on Friday night, leaving Portsmouth; fish and oysters and a lot of packages of whiskey. The fish were in barrels and boxes; the oysters consisted of tubs and also of boxes. The whiskey was put up in jugs, boxes and also crated and in cartons. The tubs of oysters were rated at 10 pounds to the gallon, I think. The tubs are different sizes, holding from one to two and three gallons. The boxes of fish were billed at 125 and also 50-pound boxes. I suppose we had about 25 tubs of oysters that night, and probably 20 boxes of fish. There may have been a hundred or more creates of whiskey. Reckon the

heaviest crated boxes would weigh 100 pounds. The lightest
49 would weigh 18 to 34 pounds. The other expressage or freight consisted of general merchandise. We put different packages of freight in one pile; that is for the different routes and stations, so there were several piles.

Q. When you were in the hospital at Sanford did you have any conversation with Mr. Cox, in the presence of Mr. Duvall, with reference to what you all should agree was the purpose of Mr. Cox's and Mr. Duvall's going to your car just before the wreck occurred?

A. That matter was mentioned. We were talking.

Q. State what that was?

(By PLAINTIFF'S COUNSEL:)

Q. Did Duvall hear all that was said at the time between you?

A. I think so. I wasn't speaking to any one in the room privately. There were maybe three of us talking among ourselves.

Q. State what was said?

A. We were speaking about its being unfortunate, how it occurred. The proposition, maybe, was brought—

(Plaintiff objects; sustained.)

Q. State what you all said, the exact words, if you can?

A. Mr. Cox said that I sent for him, they could understand that I had sent for him, and that there was somebody on the end of the car and that he came for that purpose, there being somebody on the end of the car, maybe robbers, or something like that, and he thought that would be a good proposition. I didn't verify anything of the kind. I just listened. I don't remember that anything else was said in the conversation. Yes, I think we spoke about taking a drink in the conversation, about its being unfortunate. Mr. Cox said it was unfortunate. We all three knew it was unfortunate. He said it was unfortunate.

Q. Did Mr. Cox tell you why he wanted you to agree with him that you sent for him because there was a robber on the front end of the train?

(Plaintiff objects; overruled; plaintiff excepts.)

A. No, sir, I can't say that he did. Yes, I had a conversation with Mr. Cox and Mr. Duvall at my home in Portsmouth one 50 night last week concerning this matter. Mr. Cox, Mr. Duvall and Mr. Lyon called at my brother's house the first of the evening, about 7 o'clock. They introduced Mr. Lyon as Mr. Duvall's attorney, stating that they had come over and wanted to know if I would be a witness in the case and come down to Carthage for them, and I told them I couldn't give them any answer and couldn't come unless my attorneys said so. My attorneys are Stedman & Cooke, of Greensboro. They asked me how I stood on the matter, what I was going to say, what I could testify, and I told them if I was on the stand I could give only what were the facts; that I couldn't answer them at all that night. Mr. Cox, before he left, mentioned about being in the car and my calling him. He said, "Ernest came back for me in the car after leaving Raleigh and said you said there was a robber trying to get in the car and he had better come up there and see about it." I didn't give them any answer; and on leaving they said, "Is that right?" and I said "No; if I have got to go I will give facts; that I couldn't answer them then." Yes, I heard Mr. Cox testify a while ago. Heard what he said with reference to what I said in the conversation in Portsmouth, about its not being true that there were any drinks taken in there. What he said is not true.

Cross-examination:

Think it was Tuesday night that I left Portsmouth to come here. I came on the train, the sleeper; Pullman sleeper. Mr. Baldwin

was there. I came by myself; no one accompanied me. I had my ticket and came on. No Seaboard officials came through with me. I saw Mr. Baldwin on the train, but he didn't come with me. I saw him leaving Portsmouth, but didn't see him afterwards. I came to Cameron, not Carthage. Was in the S. A. L. Railway car, the officials' car, that was switched off at Cameron. I don't know any

particular Seaboard detective and wasn't in hands of one.
51 Haven't been since I came to this town. Have met Mr.

Ghojot. Met him at Portsmouth. He came on the officials' car too. I had orders to appear. My attorneys ordered me to appear—Messrs. Stedman & Cook, of Greensboro. Ordered me to appear at Carthage. Didn't order me to stop at Cameron, but I had nowhere else to go. Mr. Stanley instructed me to go there. Yes, Mr. Ghojot was there too; was there part of the time. He has not been within ten feet of me ever since I came. No, he is not one of my familiar friends. Just met him. Don't know whether he has taken a fancy to me or not. I have not taken a fancy to him. Been sleeping at the hotel at Carthage with Mr. Nicholson. No one else. Don't know where Mr. Ghojot slept. Don't know whether he stood at the door and watched while I slept or not. Yes, I have detailed all the conversations that I had with Mr. Lyon, Mr. Cox and Mr. Duvall. Yes, I had a conversation in front of the chair car in Portsmouth just before leaving there. No, I did not, then and there, in the presence of Mr. Cox, Ernest Duvall and yourself, say that this question about taking a drink of whiskey was a lie. No, I did not state that I hoped this boy would recover a big verdict against the Seaboard and that I thought he ought to have it. I passed through the car, saw Mr. Duvall; spoke to him. He was talking about going down and asked if I was going, and I said "No;" that I had no instructions from my attorneys. You and Mr. Duvall absented yourselves and I didn't hear what you said. No, you didn't speak to me at all. Didn't ask me a question. Mr. Duvall didn't ask me a question; nor Mr. Cox. Mr. Lyon said, "Rowe, everything was all right in that car." He asked what my testimony was going to be. I said, "I am going to appear but I am going to base it on facts." I didn't want to appear on either side, but that if I came I was going to give facts in the case. You (Mr. Douglas) didn't speak a word to me. You did not tell me that I needn't get permission from my attorneys to testify to the truth. No, I didn't state in the car that Stedman & Cook were my counsel and I didn't want to appear without instructions from them. Not getting anything for com-

52 ing here. Don't know what the witnesses are paid. I have registered at hotel; paid for yesterday's dinner. Haven't paid anything since. Will pay when I leave. Yes, I took a drink in the express car. Yes, it was a violation of my duty. No, Capt. Cox and all other conductors do not frequently come into express cars. Don't say that I never saw a conductor in the express car before. They are at liberty to come in. No, it is not very often the case that I help the baggage man. Yes, have helped him to move a trunk. Wouldn't have called on him to do things for me if I had not been ready to do things for him. Yes, very often had

baggage in the express car. It is understood when the baggage man is coming in the express car. He didn't have to have a ticket to come in. The doors were right together. They would let me know so I would open the door for them to come in. No strange thing for the crew to come into the express car. No, I haven't settled my suit against the railroad; can't make any settlement. That is all I have heard. Am advised by my counsel that I cannot. No, Stedman & Cook have not settled my case with railroad. They have not agreed on a settlement. Was directed by them three or four days ago to come here and appear in this case. Didn't ask them to let me come. They sent a telegram directing me to come. Have the telegram with me. The telegram is as follows:

"GREENSBORO, N. C., January 25, 1910.

"W. F. Rowe, Portsmouth:

"We have had a conference with Mr. Stanley and have concluded, upon all the facts, that integrity and fair dealing require, that you go to Carthage. You had better go to Carthage to-night. Do not talk about your own case.

(Signed)

STEDMAN & COOK."

I wouldn't talk to plaintiff, Mr. Lyon and Mr. Cox, in the car, because I didn't like to do it unless my counsel—I was being governed by my counsel. No, they had not told me not to tell anybody what happened there. No, I wasn't acting under their instructions then. I told them I would be governed by facts only.

53 I didn't tell them the facts, because I objected to having an interview with them. This is an interview we are having now. Didn't tell the facts, because I wasn't asked for them. I said I couldn't have any interview with them. I didn't want to have an interview unless my lawyers said so. They said I was not to talk, and I didn't think it was right. No, I haven't been attending a night school down in that special car and getting special instructions as to what I should swear to here. Yes, after I got the telegram from my lawyers, I knew that Duvall had left Portsmouth; knew he was coming to Carthage. Didn't notify Duvall that my lawyers had consented for me to come to Carthage. I didn't notify anybody. I knew I had been asked by Duvall if I could appear. The telegram didn't state that I was to appear for anyone. It simply stated that I was to appear in the Duvall case. I was handed a pass, of course, to come on, by Mr. Burgess, who works at Portsmouth, I think. When he handed me the pass he said that it was to go to Carthage on; that was about all. He didn't tell me who would go with me. No one came with me. Yes, I could have had a conversation in regard to case without being in presence of a railroad detective. Any time. No, Mr. Ghojot has not been with me in the hotel lobby, on the porch, and everywhere; I have been free as a bird. Haven't been roosting pretty close to him. Don't know where he roosts. I have seen a picture of the wreck that looked like the one you show me.

Q. And you stated to Mr. Duvall and to Mr. Lyon that that was a true picture of the wreck, didn't you?

(Defendant objects; sustained; plaintiff excepts.)

A. I didn't see the picture that night at the house. Can't say that I said anything about it. Don't remember; don't think I did. Yes, I got hurt in the wreck, too. Can't say whether it injured my mind. It may have. Don't think my mind is like it used to be. No, I am not in the express business now. Haven't been able to work for some time.

Q. Did you hear Mr. Duvall complain when he was hurt at the wreck?

(Defendant objects; sustained; plaintiffs excepts.)

54 (Plaintiff offers to show by the witness the declarations and the condition of this man while he was in the hospital at Sanford.)

HIS HONOR: You can do that, if you want to, by making him a witness for the plaintiff.

(Plaintiff objects and excepts.)

Redirect examination:

The baggage car was adjoining mine. The baggage master had to open two doors to come into mine. Ordinarily I kept the door to my car shut. Yes, we are supposed to have them locked and barred.

(Plaintiff objects to question and answer.)

Q. If the baggage master wanted to get into your car, what did he have to do to get in there?

(Plaintiff objects; overruled; plaintiff excepts.)

A. He would have to notify me that he was coming in, and I would have to open the door for him before he could get in.

Q. When did the baggage master's duties call him into your car?

(Plaintiff objects; overruled; plaintiff excepts.)

A. When baggage is stored in the express car, maybe, or he would have to go through, going up to the head of the train.

Q. When did the conductor's duty call him into your car?

(Plaintiff objects; overruled; plaintiff excepts.)

A. Any time he would want to come in or pass through.

Q. With reference to those instructions you had from your attorneys about taking a part in this case, will you please state what those instructions were?

(Plaintiff objects; overruled; plaintiff excepts.)

By PLAINTIFF'S COUNSEL: Were those instructions in writing or by word of mouth?

A. This telegram was the only thing I have. Didn't have any instructions prior to the telegram, one way or the other. Yes, I refused to talk until I could get instructions.

55 W. M. KELLY, witness for defendant, being sworn, says:
Am agent for the Seaboard at Sanford. Occupied that position at time of the wreck. Went to scene of the wreck about three hours after it occurred. Got there about 7:30 A. M. Found the express car lying on the ground, turned over in the ditch to the side. Wreck occurred in a fill. Suppose it was six or eight feet deep from level of the ground. Express car was torn up pretty badly; baggage car had gone into one end of it, I suppose, half way of the combination car. The effect of it was to tear the express car up. The express car was turned over on its side. I think they had cut into the top side. The fish and oysters were scattered, and whiskey packages torn all to pieces. I got several boxes of fish out that weren't bothered. Don't know just how much freight was in the express car. There was a lot of it. The box car had been torn up by the other car running into it. Yes, I examined the baggage car. It was a combination car; one half for passengers, the other half for baggage. The end farthest from the engine was for passengers. Can't say how many doors were in the baggage car; suppose three. There are generally three—one at the end and one on each side. Counting the door in the other end of combination car would make four. With reference to partition, the doors were right near it. I found baggage car in fairly good shape. Six or eight pieces of baggage in there, in the front end of the car from the door. Baggage was in good condition. Saw only one trunk that had a hole in it. As compared with interior of baggage car, there was a great deal of difference in the condition of the express car. (Plaintiff objects and excepts.) The difference consisted in the contents being torn up. The express stuff, most of it, was torn all to pieces. (Plaintiff objects and excepts.) In my opinion, it would have been safer for a man to have occupied the baggage car on the train. (Plaintiff objects and excepts.) Yes, I went into passenger compartment of baggage car. Found it in fairly good condition. Of course, I found the cushions and seats torn up, and possibly a lamp down, or something like that. (Plaintiff objects and excepts.)

56 Cross-examination:

In making the comparison of danger, I don't think I would like to have risked it in either car. The baggage car was turned slanting—I suppose, half-way over. The baggage wasn't sitting up nice and straight. It was shoved over to one side. I should think, if a man had been in there, he would have been hit by the baggage. One trunk had a hole in it. Suppose if it had been a man he would have had a hole in him, too. Expect he would have come out of there a pretty bad wreck.

C. G. PETTY, witness for defendant, being sworn, says:

I am Sheriff of Lee County. Saw these cars after the wreck. Suppose about 9 o'clock. They had moved some of the baggage and express when I got there. None of the cars had been moved. The express car was completely torn up. When I got there, there were men at work, taking stuff out of the wreck, from underneath of

what I suppose would be called the combination car. That car had gone into the end of the other car. There was a lot of the express car torn up and broken to pieces. The baggage car was not torn up so badly. Don't know which end of it was worst; only I noticed the front end of the car had telescoped the other car. (Plaintiff objects and excepts.) Yes, I looked into the baggage car. It was not torn up so badly. Looked into part of car that was for passengers. Cushions were out of the seats and some of the lamps were knocked down. That is all I noticed in particular. (Plaintiff objects and excepts.) In my opinion, a man would have been safer in the baggage car at time of wreck.

Cross-examination:

I wouldn't have wanted to be in either one. The baggage car was not torn up so badly as the express car. Don't know whether they carried anything away except the trucks and platform or 57 not. It had telescoped the express car. I don't think it would have been safe for anyone to be in there, in the baggage car. It might have happened that a man would escape from the express car and have been killed as dead as a herring in the other. Yes, there were some pieces of express that were not broken. I didn't notice the baggage at all. Saw the wreck that morning. The picture you show me resembles it some. I know Mr. Washington, the photographer. Think I would recognize that as the picture of the wreck.

Mr. O. P. MAKEPEACE, witness for defendant, being sworn, says:
Live at Sanford. Am in the sash and blind manufacturing business. Went to scene of wreck about 7:30 next morning. Found the express car totally wrecked, demolished. The sides had all gone in together; it was torn all to pieces. The express was, some in it and some scattered all around. It was all open. The express was torn to pieces. Some of it got out whole. There seemed to be a pretty heavy lot of express. The baggage car was not nearly as badly torn up as the express car. (Plaintiff objects and excepts.) Mr. Kelly, the agent at Sanford, wanted me to help get the baggage out. I went in there with him, walked into the end of the combination or baggage car, going through the passenger end of it first, into the baggage car, and got out the baggage. It was all in good shape, I think, except one piece. It was in the end of the car next to the express car. In my opinion, it would have been safer to have occupied the baggage car at the time of the wreck, than the express car. (Plaintiff objects and excepts.) The baggage end of the baggage car was in fairly good condition, for the wreck as it appeared. The cushions from the seats were thrown about over the car, and lamps broken on the floor and sides.

58 Cross-examination:

Everything that was movable in the car was slammed about, and everything that was in the baggage end must have been slammed about. Don't think it would have been safe for a man in that

baggage car. The lamps were broken. I didn't see the stove. Don't know whether the stove was thrown clean through the car and out the doors or not. I opened the baggage car door, dug in and opened it. Some windows were broken; some were whole. I went in the car through the passenger compartment. Didn't have to dig into the passenger end, the door was open in the back. It was the baggage part that we dug into, the end that was run into the other car. Don't think there was any part of the express in the baggage car. Don't remember seeing any. It had gone into the other car. Half of the car was in the express car; busted it open. I don't think it would have been safe for a man at either place. When I say the baggage car was not so much hurt, I speak of it as in comparison with the express car. Yes, the baggage car was pretty badly torn up. Don't think it could be repaired.

E. D. NALL, witness for defendant, being sworn, says:

Saw the wreck after it had happened. I went down on the wrecking train in the morning from Sanford with the other people. Got there about 8 o'clock, or after. When I saw express car, it was demolished. A great deal of the freight, though, seemed to be in pretty good tact. They were unloading it when I was there, placing it on the ground. There seemed to be a pretty good quantity of fish in the car; oysters, whiskey and some other merchandise in general. The baggage car was in some better condition than the express car. Don't remember that I looked inside of it. Don't think I looked inside of the passenger end of it. Of course, I looked at the whole business in a general way, and noticed the windows broken out and shattered. (Plaintiff objects and excepts to all this evidence.) As to which car I would have preferred to occupy, would rather have been in the rear car. (Plaintiff objects and excepts.)

Cross-examination:

I shouldn't like to have taken chances in either. Can't say which side of the baggage car was up or down. I noticed it had telescoped into the express car and torn it up. Don't know whether it ploughed up the ground and the trucks were thrown out in the country or not. I didn't see them there.

Q. In speaking of the danger there, one car with the other, I ask you if, in your opinion, it was not highly probable that a man in that baggage car would have been either killed or seriously injured?

(Defendant objects; overruled; defendant excepts, which is defendant's ninth exception.)

Exception No. 9.

A. Well, my opinion is that I wouldn't like to have taken chances.

Q. Well, then, your opinion is that he would have been either hurt or killed?

(Ordered stricken out. Plaintiff excepts.)

— By saying that I would rather take chances in the baggage car than in the express car, I mean that the baggage car was in the rear of the express car and collapsed into the express car, and I would certainly rather be as far from the wreck as I could be, under the circumstances. A traveling man's baggage is made to stand pretty rough usage. As a matter of fact, these railroad men just push them out of the cars. That wouldn't do for jugs of liquor. I would think the contents of the express car, boxes, tubs and such things, would show wreckage much more distinctly than trunks.

60 S. C. MOFFITT, witness for defendant, being sworn, says:

Live at Sanford, N. C. Am a merchant. Got to scene of wreck between 7 and 8 o'clock. Found express car turned over on side and pretty badly broken up. Didn't go into the express car. It looked like it was all broken to me, everything in it. The baggage car was turned over on its side and had run a little piece—don't know just how far, into the express car. It was broken up a little bit. I stayed on the outside and looked in. Saw some baggage in it. As compared with the express car, the baggage car wasn't torn up anything like as bad as it was. (Plaintiff objects and excepts.) In my opinion, it would have been safer for a man to have occupied the baggage car.

Cross-examination:

Don't think he would have been safe anywhere. There was more stuff in the express car to hurt a man. Don't undertake to say that a man would have been safe in the baggage car, no sir-ee. I wouldn't have taken my chaperes in there for the world.

T. A. YARBOROUGH, witness for defendant, being sworn, says:

Live at Osgood. Was a traveling salesman at time of this wreck. Went to scene of wreck about 9 o'clock next morning. Found remains of express car torn all to pieces. The interior was entirely destroyed; as for the contents, they looked to be all destroyed, but they took out a good part of the stuff after I remained a while that was in good condition. Quite a good deal of the stuff was in the interior of express car. In my opinion, there was more than an average load. As compared with express car, the baggage car was in

much better condition. (Plaintiff objects and excepts.)

61 stepped in window and walked down the baggage car. The baggage had been taken out. I look upon being in the express car as having a shot gun loaded, heavily loaded, drawn on you, and on the other, something like a rifle. (Plaintiff objects and excepts.)

Cross-examination:

Not necessarily a rifle in the hands of a pretty good marksman. I think there were pretty good chances. Can't say as to whether I would have been in baggage car for any amount of money in the world. Never had given that a thought. I possibly might risk it. Don't think I would though. In speaking of the condition of the

car, even if there had been nothing there but the baggage car, it would have been a pretty bad thing. Well, it would have been much safer in the baggage, from the way the other car was splintered. I mean to say it was very dangerous in the baggage car, and more dangerous in the express car.

O. M. YARBOROUGH, witness for defendant, being sworn, says:

Live at Osgood. Am a farmer. Went to scene of wreck. Saw the express car. Found it completely torn up. When I got there, they were moving out some stuff, whiskey, fish and oysters, that was not torn up. But the most of it was torn up, torn all to pieces. Yes, I looked at the interior of baggage car. Its condition was not as bad as the express car. The sides of the car had not been knocked off, and those of the express car had. I went into baggage car. They had taken everything out before I went in. As to which car it would have been safer to occupy, I would rather have been in the rear, of course.

(Plaintiff objects and excepts.)

Cross-examination:

Would rather have been in the Pullman than any. Yes, would rather have been at home, five miles away, where I was.
62 Didn't say that I thought any man would be safe in the baggage car. Didn't see the stove. Noticed interior of baggage car. It showed signs of wreckage.

Mr. THOMAS GROSS, witness for defendant, being sworn, says:

I live at Colon. Am a farmer. Went to scene of wreck. Found the express car torn all to pieces. The express that was in it was torn all up. Found sides of baggage car torn loose, and tumbled about. Trunks seemed like they were whole. Don't recollect where they were. The front end of the car was knocked into the express car. Why, I think it would have been safer for a man to have occupied the baggage car at the time of the wreck.

(Plaintiff objects and excepts.)

Cross-examination:

I had rather been in the hind end of the baggage car. Yes, had rather been a mile away from there, where I was. No, don't undertake to say that a man would have been safe in the baggage car. Can't tell whether he would have come out alive or not. It showed considerable wreckage in the front side of it; more than on the back side.

J. J. WHITE, witness for defendant, being sworn, says:

Live at Severn. Am partner of a merchant; carry on a farm, but sell peanuts mostly. Have known Mr. Rowe, witness who was on stand this morning, all his life. Know his general reputation. It is good.

Cross-examination:

Haven't seen much of him since the wreck. Didn't notice him on the stand. Haven't been with him since I have been here. Haven't seen him, except when he was young. He was supposed to be a bright fellow before this wreck. He didn't always look down with his eyes half shut.

Redirect examination:

I can't tell by looking at him from here whether there is any change in his condition.

W. H. HOWELL, witness for defendant, being sworn, says:
Live at Severn. Am a farmer and merchant. Have known Mr. Rowe 20 years. Know his general character. It is good.

Cross-examination:

Don't remember how long he has been away from Severn. I used to know him when he was running express. I hadn't heard that after he got in the express business he violated the rules of the company by drinking liquor. Didn't hear him say it here on stand. If I had heard it, I wouldn't think his character as good as it used to be.

W. H. MADDOKEY, witness for defendant, being sworn, says:
Live at Severn. Known Mr. Rowe pretty much all his life. Know his general reputation. It is good.

Cross-examination:

Don't know how long since he left Severn. He was running on that road and the road near there, backward and forward, all the while. Don't know exactly what day he left. Came up today to testify, from Severn. Was subpoenaed yesterday.

64 Q. If it is a fact that this young man, while on duty in the express business, in violation of the rules of the express company, drank whiskey, in violation of the rules of the company that he worked for, would you say his character is good?

(Defendant objects; overruled; defendant excepts.)

A. I didn't know he did it.

Q. But suppose he admitted that he did?

(Defendant objects; overruled; defendant excepts.)

A. I have never heard anything against his character no way. I consider he has a good character. I don't know anything about the drinking you speak of. If it is a fact that while on duty in the express business, in violation of the rules of the company, he drank whiskey in violation of the rules of the company that he worked for, I would say his character is not good. But I thought you meant was his general character good.

(Defendant asks that this answer be stricken out; overruled and defendant excepts.)

MR. ED. C. ROBINSON, witness for defendant, being sworn, says:

Was engineer on the passenger train that was wrecked that night. Train stopped once between Raleigh and place of wreck, at Cary. I was on the engine when the wreck occurred, the passenger engine.

Cross-examination:

Was running 40, 45 or 50 miles an hour at time of wreck. Have no means of ascertaining how fast the freight train was running. Didn't know what had happened, we hit it so quick. Yes, I saw baggage car and have some recollection of it. It was torn up some, but not as bad as the rest of the train. The baggage car was torn up some to my recollection, but my recollection wasn't very clear. I was

hurt myself pretty badly. I have known Ernest Duvall ever 65 since he has been on this run, I reckon. Can't tell how long he has been on. I had not been on there long myself. I came off the Columbia run. His general character is good, so far as I know.

The Court here took a recess until 2:30 p. m.

CAPT. WREN, witness for defendant, being sworn, says:

Am a conductor on the S. A. L. Railway. Have been for three or four years, running from Portsmouth to Monroe, Portsmouth to Norlina and Portsmouth to Hamlet. Yes, I know what the custom has been on that road prior to the 13th day of March, 1909, with reference to the baggage masters going in express cars. (Plaintiff objects and excepts.) The custom has been that when there is baggage in the express car, he has a right to go in there, check up and look after it the same as if he were in the baggage car. (Plaintiff objects and excepts.) When there was no baggage in the express car, he had no right in there then. (Plaintiff objects; sustained; defendant excepts.) They evidently went in there sometimes. The custom was not to go.

Q. State, so far as you know, what was done when they were caught in there, when they had no duty in there?

(Plaintiff objects and excepts.)

A. I can only tell you in my own case. (Plaintiff objects.) Can't state how often it occurred that there was baggage in the express car. (Plaintiff objects and excepts.) It occurred in cases of overflow baggage. Whenever we had too much for the baggage car, we put it in the express car, when there was room for it. I have never had a case when it was allowed to go in when there was not an overflow. We never attempted to put it in when we were not crowded. On and prior to the 13th of March, 1909, my run 66 was from Portsmouth to Monroe. Capt. Cox then had the same run as mine. I don't know whether the baggage and express cars went through together from Portsmouth to Birmingham. They went as far as Monroe. The same train took them from Monroe. They left there together. (The plaintiff objects and excepts to all this evidence.)

Cross-examination:

The baggage man is under control and direction of the conductor while on the train. He is bound to obey his orders.

Q. So if you were to start from the baggage car into the express car and tell the baggage man to come on with you, it would be his duty to go, wouldn't it?

(Defendant objects.)

Q. If, under the custom of your road a conductor were to direct a baggage man to come with him into the express car, wouldn't it be his duty to go?

A. I think so. The conductor had a right to order the baggage man on any part of that train, at any and all times.

Redirect:

If the conductor had told the baggage master to go into the express car to take a drink with him, he would not have been bound to obey. (Plaintiff objects and excepts.) If that is what he had told him to go in there for, he would not have been bound to go in. (Plaintiff objects and excepts.) If the conductor instructed the baggage master to do anything in violation of the rules of the company, I don't think he had a right to comply with the order. (Plaintiff objects and excepts.) In the event as to whether anything was contrary to the rules of the company, the conductor, and not the baggage master, I suppose, would be the judge. They must obey the orders of the conductor, but I take that as a reasonable order.

Q. But the rule is absolute, isn't it?

(Defendant objects. Withdrawn.)

67 Defendant offers in evidence the rules which have already been identified by the plaintiff, Mr. Duvall, Rule- No. 662, 663, 664, on page 80, and reads them as follows:

Rules.

No. 662. Train baggage men report to the train master. They must obey the orders of the conductor; and at terminals, the orders of the yard master or station master. They must conform to the instructions issued by the accounting and passenger departments.

No. 663. They must handle carefully all baggage consigned to their care, and properly handle all letters or packages forwarded on railroad business addressed to the officials or agents of this railway, or its immediate connections, and will give to the United States mail the same close attention, when entrusted to their care.

No. 664. They must report for duty at the appointed time; remain in baggage cars while on duty, except when required to take the place of the brakeman. Be civil and obliging to passengers, and not permit anyone to ride in the baggage car except those whose duties require it.

Mr. G. F. BRONSON, witness for defendant, being sworn, says:

In March, 1909, I was route agent for the Southern Express Company, between Raleigh and Savannah. My duties are not stated in a rule book. They were to look after the express business generally; I had control of the messengers, carried them on my pay roll, employed them and relieved them when necessary, looked after the agents and checked their accounts. The messengers are the men who handle the express in the cars of the train, traveling from one terminus to another. I suppose I would average two and one-half to three days in a week, going over the route from Raleigh to

Monroe. Usually traveled first in the express car and then
68 in the passenger car. As to the rules of the company with

reference to the messengers allowing other people to be in the express car, people who are not employed by the company, the messengers have printed rules. I have not a copy of them. (Plaintiff objects and excepts.) It is against the rules to allow anybody, outside of the officials of the express company, in the express car, unless he has a letter from the route agent or superintendent, authorizing him to carry them. As precautions, to preserve the packages in the express car, we provide iron safes for the money, and what we call P. P. trunks (paper parcel trunks) for small packages. The doors are barred with iron bars and provided with locks, to keep them securely fastened. The railroad company was entitled to carry baggage in the express cars in case of an overflow. (Plaintiff objects and excepts.) When there is a baggage car, the baggage is carried there, according to instructions. When there was no baggage car on the train, the baggage was just carried in the express car. I have never observed the rules of the company being violated in this particular on this route. (Plaintiff objects and excepts.)

Cross-examination:

The cars that we were hauling express in belonged to the Seaboard Air Line Railway, I suppose. I don't know that of my own knowledge. They do not belong to the express company, that I know of. The conductor is in charge of the entire train. No, it is not the custom, and hasn't been with me, for the flagmen and brakemen to go in whenever they want to. We refuse them all the time. They are not bonded with us. The conductor is not bonded with us. He had a right to be in there. He has no right to bring anybody in there with him unless it is for something unusual, as to come in and get somebody out. If the express messenger sent for him, he would

have a right to go in and take somebody with him. No, it is
69 not against the rules of the express company, in the hurry and accumulation of business, for the express messenger to get the flagman to help him with his duties. The baggage man lets the baggage stay where it is until it gets to its destination, and then he gets the porter, or somebody, to help him get it out.

Q. What is the reason he cannot do it while the train is running; where are the rules? Did you ever see such a rule as that?

A. Yes, sir. The rule says you must keep the door locked and no one allowed to ride in the car except bonded employees, and they

must be furnished with instructions from the superintendent. Yes, that applies to train people, too. I say so. Everybody is barred from the express car except the conductor. Yes, the rule does say so. It excepts everyone, but, of course, we understand that the conductor has a right to come if he thinks the messenger is carrying a passenger. He is the boss man of the train. Yes, he is over me. If I did not behave myself, he would put me off.

Q. Yet he can't bring anybody along with him unless there is absolute necessity for it? Did you say that? Did you say that the conductor of the train couldn't bring his flagman or porter into the car if he wants to?

A. If the conductor had a reason for bringing him there, I suppose he could. I don't know whether he would bring him without a reason or not. If the expressman invites the conductor and the flagman in there, I don't know whether they would have a right to go in or not. If the express messenger needed a baggage man in there and asked him to come in, I suppose the baggage man would be exonerated in that case; suppose he would not be violating the rules then. The baggage man is under the conductor and not under the express messenger.

Q. How could the baggage man be violating the rules of your company when he is not an agent for it, and has nothing to do with it? If you left the door open, couldn't anybody walk in there and not be under your rules? If a passenger would go in, would he be violating the rules?

A. I think he would. Yes, if the United States army
70 should come in, they would be violating the rules, but I suppose the rules would take second place in a case of that kind.

Dr. W. A. MONROE, witness for defendant, being sworn, says:

Am a physician. Been practicing twenty years. Graduate of University of Maryland. Have taken a post graduate course and also attended the Polytechnic Institute. I was interested in a hospital at Sanford on March 13th, 1909. Mr. Duvall, the plaintiff in this case, was brought to my hospital on the 13th day of March. I saw him that afternoon before five o'clock. When I saw him, he was in bed. I examined him. At that time, gave him just a sort of look over examination. I was told, in his presence, that he had a fracture of the little bone on the outside of his right leg (plaintiff objects and excepts) and several other bruises about his body, fractures, and complained of pain in his back. Nearly every time I saw him after that, I gave him an examination. Don't remember the exact time that I looked over him carefully, but it was quite a number of times during the time he was there. During the time that he was in the hospital, he complained of his right, or broken leg, and back. The most particular complaint, as well as I remember, that he made with reference to his leg, was as to its being so uncomfortable about the ankle and the point of the fracture. I was afraid the cast might have been so tight as to cause injury to the fracture, and went back to see about it. I think after that, he complained, off and on, of

his broken leg, up until the time he left the hospital. While he was there, I discovered no numbness in that leg. He complained of so much pain that there was no necessity for making a test of any kind. He complained at some time, nearly every day, of pain in his back, noticeably before bedtime in the evening. He would complain so much that I did examine his back carefully on several occasions. The location of the pain was in what is known as the small

71 of the back, or just below the ribs. On account of his complaining with that pain, I went over the spinal column with

the naked eye, with the finger and hand, and at that time we were unable to detect the slightest fracture, or any sign of a fracture. The characteristic symptoms of fracture or injury to the spine or the spinal cord, or injury to the bones, regardless of the nervous symptoms, some form of displacement, what would be termed a transverse fracture, or fractured dislocation. In a bad break, you would find unevenness in the spinal prominences, the little bumps in the spine; ordinarily, in such case, the upper section goes back, and you can see a little bump-out. I found nothing of that kind. The outside line was in line. The protuberance here was absent, and it was absent yesterday afternoon. His spine was curved internally, instead of as you will find in the ordinary usual breaking through of the vertebra. The muscles of the back were in considerable rigidity at that time. Assuming there had been a fracture of the vertebra of the spinal column, the effect upon the cord would have been, if the fracture is accompanied by much dislocation, it would develop a certain strain of nervousness. If it is a transverse or complete fracture, there is no sensation from that point, and below, loss of control of the sphincter, etc. Assuming that there has been such a pressure upon the spinal cord as to practically interfere with its functions, such interference would cause extreme nervousness, followed by numbness, and usually, to begin with, increased reflexes, without the knee jerk, and all those things. Tap the knee like this and the foot goes over. We make other tests, such as pricking the skin. Other symptoms are, the plant, surface of the foot, has a peculiar feeling, and the jerking back of the toe, and the spastic relations; it stops wriggling, that way. Plaintiff was in my hospital from March 13th to March 22d. I discovered none of the characteristic symptoms of injury to the spinal cord during that time. We made the ordinary examinations in such cases, palpitation and reflexes. I don't think we stuck pins in him, because the sensa-

72 tion in the feet was sufficient. He complained of absolutely no numbness in either of his legs to me. While there,

he told me of nothing to indicate to my mind that there was any numbness or paralysis of his legs, nothing whatever. If there had been a real injury to the cord, we ought to have discovered it. As soon as there is an appreciable injury to the spinal cord, as distinguished from the spinal column, the external or outward evidences will be those just mentioned, such as hyposthesia, or over feeling or under feeling, interference with the discharge from the bowels and kidneys, and those nervous contractions, spastic conditions, or over action of the reflexes. In my opinion, there could

not have been any appreciable injury to the spinal cord while he was in my hospital.

Cross-examination:

Have been in the employ of the S. A. L. Railway some four, five or six years. I have assisted in one operation on the spine, at home in the hospital at Sanford. The person operated on died. That was a transverse fracture of the cord, with severance, practically in two, and was higher up in the spine, in the middle of the back. There was nothing appreciable the matter with the boy's spine when he was in my hospital. I do not say that the spinal column was not injured, but there were no symptoms to justify me in finding that there was such injury. It seems that this has developed into a serious injury after this long time. I have not had an opportunity to examine into the case since he left the hospital. I do not undertake to leave the impression on the minds of the jury that that boy is in a worse fix than he was. I said if the symptoms were as they appear, he has now an injury to the cord, and I take it that they are like they appear to be. I can go down to the room and take some doctor with me, if the plaintiff will submit to an examination, so that I may state what condition he is in at present.

73 Q. If that the jury shall find from the evidence that on the 13th day of March, 1909, this boy was caught in a wreck, that he was taken to your hospital at Sanford, and complained as you say he did, with his back, and after he went to Portsmouth; if the jury should further find from the evidence, that he continued to complain of his back; that when he attempted to get upon his feet he found he could not use his legs, and that there was paralysis, no feeling in the right and left leg, what will you say was the condition?

A. I believe that his trouble is indirectly the result of the wreck, my candid opinion. If you will let me explain, I will tell you why. At the hospital at Sanford, I, and no other doctor that saw him, but personally speaking, I had no cause to make me believe that there was a real fracture of the spine. He had, it is true, right often, considerable pain in his back, and complained of it so continuously that it caused me to look at him particularly and watch over his condition, and my impression is, from the symptoms that he has now, that there was really an injury to the bone; that it was not, at that time, a depression of the cord; and that, later on, there was depression on the cord, and that later he developed these symptoms. If it should develop, under the taking of an X-ray picture, that there was an absolute fracture but no callous there would have been very bad blood, which would have been thrown out around it. If the spinal cord was cut, the X-ray wouldn't show it. The depression there on the bone happened after he left us. If there was a loose bone, his moving would have caused it to slip. I know Dr. Lomax Gwaltney. Was right much impressed with his appearance on the stand. That is the first time I ever saw him.

Q. So, as I understand you, your evidence amounts to this: That

at the time the boy was injured and carried to your hospital, he had no very serious injury to his spine, or you didn't discover any?

A. I won't say that there was not a serious injury. I want to say that I was not able with ordinary precaution, to discover any trouble with the cord. An injury to the column, if it doesn't 74 encroach on the cord, doesn't affect a man's nervous system.

He might have a weak back but proper motions. Yes, when I set his leg, he suffered pain. I think as much as anybody. He did not tell me that at the time I set his leg he didn't feel it at all.

Q. The grey matter in the spinal cord has that, if it reaches the wound, or suffers any from depression or decomposition, has it not self-recuperative power?

A. No, sir; none. These little branches that enter in just after they leave the spinal column, they have a covering. Sometimes by uniting them, you get sensations beyond. There is one case on record where the cord was separated and brought back and they got sensations. It is said to be possible to sever a facial nerve and afterwards unite it and get sensations. I have only met Dr. F. S. Hope since I have been here. If this man's condition is real, as I saw him here yesterday, there is no hope of his complete recovery. It is likely that the paralysis in his legs will last as long as he lives. I think possibly his condition will be better. My experience with such cases is not that it is such a hazardous one. The operation that I had was higher up. The man that I operated on a few inches above, in the middle of the back, died.

Redirect examination:

The case I speak of was about the middle of the back, and the cord was cut pretty nearly in two. The higher the injury the more danger there is. There is less danger lower down. The man that we operated on lived three or four months. He died from the effect of bed sores, and all that sort of thing. He did not die from the operation. I said that Mr. Duvall should be operated on even yet because I think it would relieve his pain. (Plaintiff objects and excepts.) And in the hope of relieving him of some suffering and restoring some motion. If the operations had been performed as soon as the symptoms were manifested, the 75 chances would have been much better. He might have had almost complete recovery of at least all that he had left, and it would greatly have relieved him of his pain.

• Recross-examination:

He ought, in my opinion, to have been operated on as soon as the symptoms were plain enough to detect the trouble.

Q. Wouldn't continued pain in the back, and numbness of the limbs be sufficient symptoms? Wasn't the proper thing to submit him to an X-ray examination?

A. No, sir, there wasn't enough symptoms to submit him to an X-ray examination.

— If after he left my hospital, his condition has continued to

grow worse and worse, wouldn't that have justified an X-ray examination and prompt action?

A. Yes, sir, Dr. Burke is chief surgeon for the S. A. L. Railway.

Mrs. McBRANEY, witness for the defendant, being sworn, says:

After the 13th of March, 1909, I was on duty in the Carolina Hospital, at Sanford, as trained nurse. Mr. Duvall was in the hospital while I was there. I remember him very distinctly. I was a trained nurse in the hospital at that time. I am not now. He complained of his back and leg; I think he complained more of his broken leg than he did of his back. He complained of great pain in his back was all. We would always rub it with alcohol or liniment when he complained. That would relieve it temporarily. He complained of his leg being too tight and wanted the doctor to take the plaster cast off. I think for two or three days, right straight along, he asked the doctor to take it off. His leg seemed to pain him the most. I discovered no irregularities with reference to his kidneys and bowels.

76 Cross-examination:

He did not complain of losing his legs here in the hospital that I know of. If he complained of numbness in his legs, I know nothing about it. He couldn't sit up. We don't allow them to sit up with a broken leg. The length of time is different in different cases. I don't remember just where his leg was broken. I didn't see so much of him. I was on night duty then. The plaster cast went above his knee. I heard him complain of no sleepiness or deadness at all in his legs. I rubbed his back when he complained of pain. Every time I thought he needed it. Yes, he was very nervous, but not nearly the most nervous patient that we had. We had several more nervous than he. At times he was all right, lively and laughing. He didn't sleep well at first. Before he left, some nights he would sleep well and some he wouldn't. Don't know what was the matter with him when he wouldn't sleep. Just didn't seem to be able to. Was suffering when he came, and suffering some when he left, and I guess he did after he left.

Dr. HOLLIDAY, witness for defendant, being sworn, says:

Live in Portsmouth. Am surgeon for the S. A. L. Railway. Am a graduate of University of Virginia; studied in New York; served eighteen months at a hospital in New York and been practicing in Portsmouth since 1893. Am connected with the King's Daughters Hospital, a general hospital, in Portsmouth. I knew Mr. Duvall before he was injured. First saw him after the injury on the 22nd of March, 1909, at Sanford, N. C. He then had a broken leg which was up in a plaster paris bandage. My attention was called to that. He complained of some tenderness and some soreness in the back, low down, just about the waist line. That is when I saw him at Sanford. I went to the hospital there and took him on the car to Portsmouth that day, to the King's

77 Daughters Hospital. Had him put in a room to himself there, left my orders, and after that, examined him thoroughly and carefully. That was the 23rd of March, 1909. He complained of soreness, tenderness and pain in his back. I examined his back thoroughly and found evidences of tension on the left, about the region of the left kidney. The sensation in his legs at that time was good. When you touched his legs, or any part of his body below his waist, he could feel it. I found no evidences of paralysis in his legs whatever. All that I found is what I have stated. I kept him in bed for some weeks. All characteristic symptoms or signs of pressure on the spinal cord at that time were missing, absolutely missing. The first symptom I would expect to find from pressure on the cord in that locality would be some paralysis below that point, some loss of sensation—that is, if you stick in a pin, he would not be able to feel it; some paralysis of the bladder and rectum. In other words, if he wanted to pass his water, he wouldn't have been able to do it voluntarily. The same applies to the rectum. There would have also been some change in his reflexes. If you let one leg hang, like that, perfectly loose, over the other, and strike the patella right hard, there would be no response. That would be what we call the patella reflex. We found nothing whatever indicating any change in that. For the pain in his back, I had his back strapped up tight with adhesive plaster, supporting it, and for days and days it gave him absolute ease. He said his back was perfectly easy. After that, I put on other methods of treatment, and ended by getting an ordinary pair of ladies' stays, of very stout variety, and strapped him up in those, and he went around. It was four to six days after I first strapped him up that he complained of pain in his back. He was then lying in bed. I kept him in bed from four to six weeks. Several times I examined him to see if I could detect or discover any evidence of fracture of the spine—each time that he would complain of it. It was in June, after he left the hospital on the 30th of May, that I first discovered symptoms of injury
78 to the spinal cord. After leaving the hospital in May, he

went to his father's house, his family residence. I took him to Baltimore about the 13th of July. He then came back to the hospital about the 30th of July. In the meantime, he would frequently go home and spend the day at his father's house. He was discharged as a patient on the 30th day of May. He was getting around on crutches, putting one foot in front of the other. At the time we discharged him from the hospital, he showed no symptoms of spinal affection. He appeared to be getting better. He complained occasionally, but his back seemed to be getting stronger. I don't know whether he then had on a pair of stays or a cast of adhesive plaster. It was some time in the early part of June that he **complained of certain symptoms**, that is, when he crossed one leg over the other, he couldn't feel it. On the front porch of his house, I made certain tests and discovered there was some evidences of spinal cord injury, and I told him the best thing to do was to have an X-ray examination. The photograph, taken by X-ray, is called a skyograph. I haven't the picture. I will say this. We haven't got

a picture that we made that day. No human being has it. We discovered from that *skyograph* on that day that there was a lesion of the spinal column. None of us could quite say what the lesion was. We discovered that from the picture of the X-ray. I was present when the X-ray was put on him. When the photographic plate was taken out of the holder (I was present when it was taken), it was taken in the dark, and when I examined it, I discovered a lesion of the spinal column. I then advised the patient to consent to an operation. That is, the taking out on each side of the spinal column of a piece of bone, called the —, to relieve the pressure on the spinal cord. At that time, I believed the operation would have cured him. (Plaintiff objects and excepts.) At that time, the paralysis of the legs was comparatively slight. He could still move each leg voluntarily. He refused the operation. As to the effect of the operation, personally, I think the operation would probably

have cured him. I have seen six or seven such operations,
79 I think, been concerned in them, and have never seen one die yet as the result of the operation. I don't consider it a dangerous operation, especially in that part of the spinal column. When you get up in the other regions it is a different proposition. After he refused to submit to an operation, I noticed that he was getting no better and I then carried him over and got another *skyograph*, and that is the one I think they refer to. The first one was in June, hot weather. After they put it in water, they forgot about the temperature of the weather, forgot to put in ice, and the whole thing melted right off the plate. The next one was taken later. That second *skyograph* was taken some time late in June, or in July. That showed conclusively a dislocation of one of the lower lumba- vertebra, a piece of the backbone. It showed both fracture and dislocation. In the meantime, the trouble had progressed. He had gotten worse. After I had that second *skyograph* taken, which was saved by putting ice in the water, I again advised an operation and he again refused, and after several days I took him up to Baltimore and gave him every opportunity. Took him to Dr. H. M. Thomas, of John Hopkins' University. Dr. Baker there took another *skyograph*, which I never saw. They forgot to put ice in the water and it melted off the plate. After taking him to Baltimore, I had a conference with Dr. Thomas. He advised us to go to Dr. Baer. We did. Dr. Baer was out of the city and we went to Dr. Fairweather, and he advised application of a plaster cast. I told Duval we would put it on but I didn't think it would do him any good. I advised an operation, and gave my reason that if he put the cast on and it did no good, it might be too late to operate. If we operated first and then put the cast on, it would do as much good. He again refused to consent to an operation. I think we were in Baltimore on the 14th of July. I think, if he had consented to an operation then, that he would have been very nearly cured. (Plaintiff objects and excepts.) After the 30th day of July, I applied a plaster cast. I still tried to persuade him to have an operation. I put the cast on him about the 30th day of July, all that time advising against it. On the 27th

of July, I think it was, he told me he had decided to leave the hospital and bring suit, and he left. Yes, after that I was called to his house and he asked me certain questions which are not pertinent. Other than that, I did not attend him professionally.

Cross-examination:

I have already testified that I am a surgeon for the S. A. L. Railway. Been in their employ since January 1st, 1903. I am also a nephew of Judge Watts, general counsel for the Seaboard, and am not ashamed of it. Can't see that it has any connection with the case. No, am not proud of it. Judge Watts happened to be my uncle. Neither one of us had anything to do with it. Yes, I advised the taking off of the plaster cast when he left the hospital, for the application of another one. After that one had been on for about thirty days, it would naturally shrink some, so I advised a second one. No, I didn't tell him he shouldn't take that plaster cast off. I said I didn't think it was treating himself or me fair, to leave with the treatment that I had applied. I said I had attended as many as six or seven operations on the spinal column, I think. It was in the lumbal region of the backbone. Yes, I know a great — about Dr. Murphy. He is very good authority. As to his reporting fifty per cent of deaths of any kind from operations in the lumbal region, I cannot say what he reports. If he does, it depends entirely on what it is done for. No, I don't think that the deaths from all kinds of operations average fifty per cent. Yes, we went to see Dr. Thomas. Had no correspondence with him. Do not know his handwriting.

Q. Didn't he make this statement to you: "This examination reveals evidence of injury to the spinal cord, due to — of fracture to the vertebra; and, further, if he didn't state, "Unfortunately, the condition is a very serious one, and the question is whether it should be advisable to operate in endeavor to give the spinal cord opportunity to improve?"

A. Part of that is as you read it. But there is another remark made which has been left out. He said that, "When it comes to an operation or putting up in plaster cast, you are a better judge of it than I am, but I, personally, wouldn't do either." Because he simply makes diagnoses and doesn't treat.

Q. I ask you if he didn't say that the surgeons there advised it would be better not to operate at that time? Do you testify as a fact that he didn't make that statement, that the "orthopedic surgeons here (Baltimore) believe and advise that it would be better not to operate at this time?"

A. I say most positively, he did not. When I saw Dr. Thomas, he had never heard of this particular case. I carried up to him the *skyograph* of this case. He declined to look at it and referred me to the orthopedic surgeons, and I have never seen Dr. Thomas and never spoken to him, except once, and that was over the telephone, since, and then the operation was not referred to. After I took Mr. Duvall to the orthopedic surgeons, I never saw Dr. Thomas.

No, Dr. Thomas did not say that the operation would be an expensive one and that the benefit of it could not be foretold.

Q. I ask you if he did not say that "At present, there should be a plaster cast?"

A. I say that at that time there had never been a plaster cast put on. Yes, I had a conference with Dr. Fairweather. I wouldn't like to identify his handwriting. I have had two letters from him. I would not undertake to say that that is his signature, but I wouldn't like to undertake to say that it is not, either. When I saw Dr. Fairweather, he had not seen the result of the skygraphic examination. I had a letter from him three or four days later in

which he makes no mention of any such prognosis. I have

82 the letter here. Yes, this letter was certainly written by Dr. Fairweather.

He did not tell me, but wrote me that "because of the extensive crushing of his spine, it would be very dangerous to operate. Personally, to me, he did not say "I advise against operation"; most emphatically not.

Q. "At least, until other measures have been given a fair trial?"

A. Not personally, most emphatically not.

Q. Didn't he say that * * * plaster cast and well adjusted * * * on the head and legs should be tried, and that one could hardly expect to see any change in a number of days?

A. He most emphatically did not say that to me personally. What he said to me, after the examination of Mr. Duvall in Baltimore, was done entirely by correspondence, in one letter. He said nothing after that because he was waiting to see the result of the X-ray examination, which he didn't see for some time. No, I have no letter from Dr. Thomas with me.

Q. It is not a fact that these diseases of the spinal column, or this injury to the spinal column, as they advance along the seriousness progresses, they get more serious; that is, they can be slight at the start, and yet, along in time, they get more serious?

A. At the time of the injury there can be absolutely no symptoms, and maybe after weeks there can be some symptoms, and after those symptoms go on, week after week, they greatly progress and get worse and worse.

Q. I believe you say that after your conference with Dr. Fairweather, he wrote you this letter?

A. Yes; notice the date, please.

(Witness here read letter from Dr. Fairweather.)

Yes, he advised me against an operation. No, he is not a very eminent surgeon. He is simply an assistant of Dr. Baer. I went to him because Dr. Baer was in Europe. I went to Dr. Thomas first and he sent me to Dr. Baer. There may have been a fracture at Sanford. I saw no symptoms of one then, nor when he got to Portsmouth in June. I have not said that he did not have a fracture at

83 Sanford. I don't think, considering the great scope of the fracture there now, that it is so remarkable that there were no symptoms then. I have known Dr. Lomax Gwathney for twenty years. His reputation as a surgeon is first-class; none better. I haven't seen this boy, except to pass him in the street, since last

August. Can't say as to his condition now, nor as to his suffering since then. You can lay down no rule for the length of time a patient should stay in bed with a broken limb. Six weeks, I should say. At the end of that time he could get about on crutches. No, to my knowledge, he has not walked a step since the wreck, without crutches.

Redirect examination:

Date of letter from Dr. Fairweather is July 17th, 1909.

Recross-examination:

Was in Baltimore with Duvall on the 14th of July. Practically four months after the wreck, but over a month after we had made the recommendation for an operation. That was made in June. I advised the operation in June, absolutely. I took him over the second time for an X-ray examination in July.

Redirect examination:

Q. This examination that Dr. Fairweather refers to in the letter that you have read, did it disclose any difference in prognosis from that which you had made?

A. None that anything calls my attention to. The reason I took him to Baltimore is that I had advised and insisted on his being operated on and he had refused. I recalled the fact that Dr. Thomas was a professor at John- Hopkins University, and was now at John-Hopkins Hospital. (Plaintiff objects and excepts.) I thought 84 that he, being an expert on nervous diseases, and a professor of nervous diseases at John- Hopkins University, could give me the best advice, and I wanted to give Mr. Duvall the benefit of the best advice that could be had. I took him to Dr. Thomas, and after examining him, he advised that I take him to Dr. Baer for the operation. I went to see Dr. Baer and he was in Europe. Then he asked me to go to see Dr. Fairweather. I had never heard of Dr. Fairweather until that day.

Dr. A. H. McLEOD, witness for defendant, being sworn, says:

Live at Aberdeen. Saw Mr. Duvall after the wreck, first in the car, after he had been removed from the wreck, in the Pullman car, at Moncure, I think it was possibly ten or eleven o'clock on March 13th. I examined him and helped to adjust his leg. That was at the hospital at Sanford. He complained considerably of pain in his right leg and his back. I heard no complaint whatever as to the numbness in his legs. Discovered no paralysis whatever. Made an examination of his back. Went over each backbone joint thoroughly with my finger, and found no evidence of a fracture. Discovered no other symptoms in injury to the spinal cord. Didn't see him after that time. That was the first and last time I saw him.

Cross-examination:

Yes, I am in the employ of the S. A. L. Railway. Had there been any very extensive fracture of the vertebra there, it is very

probable that I would have found it by such examination. There might have been a crack there that I couldn't feel. Yes, I heard what Dr. Fairweather said in his letter, but I didn't find it at all. One doctor will find a thing and another won't. It is largely a matter of opinion, just like a lawyer. A man might discover a patient for a fracture of a bone somewhere and not discover anything at all and I might come along and find it. And one fellow might have an opinion about numbness in the legs and another might not. It is just a matter of what the doctor finds. It is not a matter of what he does not find, not necessarily.

Redirect:

In the letter that has been read here, I suppose the doctor found fracture from the skyograph, which is made with an X-ray. I didn't do that. Saw no symptoms that called for an X-ray examination.

Reeross:

If there had been a fracture at that time, I possibly might not have found it with an X-ray then. After a time, when the callus had formed on it, it would have been more visible.

Dr. LEM McIVER, witness for defendant, being sworn, says:

Am a practicing physician. Graduate of University of Kentucky. Took a post graduate course in New York and been practicing eight and one-half years. Am connected with the Sanford hospital. Yes, went to scene of wreck. Found Mr. Duvall in the car. He seemed to be suffering with his back when I saw him. I didn't go and examine him thoroughly because Dr. Monroe had gotten there before I did, and had already given him treatment, and as I went in the door, they told me there were other patients needing treatment, and I went to them. There were four or five colored people there, slightly suffering. They had bruises, etc. Think they left the hospital that afternoon. Some left in two or three days. (Plaintiff objects and excepts.) Yes, I helped to set Mr. Duvall's leg. I don't recollect any special symptoms of pain about it, but there was 86 no anesthesia, no lack of pain. I saw him several times after that. He was Dr. Monroe's patient, but I saw him. Yes, I made special examination of his back. Discovered nothing but pain, and that only from his complaining. I discovered no characteristic symptoms of injury to the spinal cord. Heard him make no complaint with reference to numbness of his legs. Saw no evidence of paralysis whatever.

Cross-examination:

Can't say whether I saw him wriggle his toes. Don't remember his moving his legs. No, he didn't lie there like a lump of clay. He was turning and smoking. There was enough motion to indicate that there wasn't any paralysis. The leg wasn't in plaster of paris; it was in splint. I don't recall whether he moved that particular leg or not. I was not there when Dr. Burke made an examination of him. I was called to Colon. The Seaboard Railway paid me for my services.

Dr. GILBERT MCLEOD, witness for defendant, being sworn, says:

Have been a practicing physician since 1882. From 1882 to 1887, practiced near Wadesboro, N. C., in Anson County. Since that time have been here at Carthage. Am a graduate of the University of Maryland. Taken no post graduate courses. Have only seen two fractures of spine. As to whether or not a fracture of the spinal column would affect the spinal cord, unless it produced some pressure on the cord, it is my opinion the nerve force would continue, unless the cord was entirely severed, or there was pressure sufficient to stop the flow. Then if there was no pressure to the spinal bone, the backbone, upon the cord, there would be no effect whatever upon the cord, except to produce some pain. As soon as there should become appreciable pressure on the spinal cord,

87 on account of the fracture of the spinal column, there would possibly begin to be numbness as the pressure would get more severe, followed by paralysis, then the sphincter probably would be involved. As to whether there could be such a thing as appreciable pressure upon or injury to the spinal cord, without there being outward characteristic symptoms developed, depends upon what stage of the game you made the examination. There should have been some appreciable difference in the fracture of the bones, one pushed in and the other out.

— Assuming that there was an injury to the spinal cord, as the result of the pressure upon it from the fractured column, would there not be immediate evidences of it?

A. Yes, and paralytic symptoms. Assuming that there were no characteristic symptoms or evidences of injury to the spinal cord, in the case of Mr. Duvall, it would be my opinion that the fractured column was not pressing upon the cord.

Cross-examination:

I have seen two operations of that sort. They did not die from the operation. Both lived to be quite old, died from inflammation of the bladder, and trouble of that kind. I would rather not undertake an operation of that kind without help. I saw this operation performed at Sanford, and the young man lived three or four months. I saw him after that.

Q. That was a remarkable successful operation, to give him three or four months, wasn't it?

A. Yes. I saw Dr. Monroe perform that operation. Saw him pull out from the spinal cord the little splinter of bone. Yes, I heard the letter from Dr. Fairweather read here. Yes, I think that would be a very serious operation. Of course, the lower down on the cord that the operation is to be performed, the less danger to life. As to how low it can get before it ceases to be very dangerous, depends upon the care with which the operation is done, so as to avoid infection. It must be down in the lumbar region, in what is called the lamina. I think his was about the seventh dorsal. Supposing this injury was in the lumbar, that is very dangerous too. But if it was in the first, it would be more serious than in the fifth. The grey matter in some men's backbone extends down through the

88

fifth. Yes, it depends on the man. If it should be entirely severed, I don't think an operation, or anything else would ever restore the functions. Yes, I saw the examination made here yesterday. It looked real to me. It was the first time I had seen the man.

Q. If the jury should find from the evidence that the young man was caught in a wreck the 13th of last March, and immediately began to complain of suffering in his back, and remained in the hospital at Sanford for some time, complaining of pain in his back, and went from there to Norfolk, still complaining of pain in his back, what, in your opinion, would you say was the cause of his condition as you saw him here yesterday?

A. That begins to look like there was a fracture. I would take it, back at the wreck. I think * * *

Q. In your opinion, from what you have seen here, as a medical practitioner, was there any chance for the recovery of this man?

A. At this stage, I have little hope for any. I am not a nervous specialist, though. He had the appearance of being a very great and constant sufferer. Yes, I am also a Seaboard surgeon. Yes, he is a great sufferer, unless an operation would give him relief. In my opinion, I don't think the operation would be a very hazardous one. Not so much so as the doctor on the stand yesterday testified, but that is a matter of opinion. Taking Dr. Fairweather's letter to be true, I would take it from his letter that it would be a very serious one. In that case it would be more hazardous.

Q. If the jury should find from the evidence here that this young man was caught in a wreck, and that his legs immediately became numb, and that in the setting of his leg at Sanford, it gave him no pain, and that that broken leg has healed up without having given him any pain, and that from the moment at Sanford 89 he lost entire feeling in his right leg, and had the supersensitivity about the waist, what would you say it was produced by?

A. That would be produced by pressure in the lumbar region.

Q. Wouldn't it be produced by * * * the grey matter?

A. Yes, if your statement is taken to be true, it was done by pressure of the bone, if there was pressure at that time. Yes, if there was pressure at that time, at the time of the wreck, and that pressure continued up until the middle of June, in my opinion, the pressure of the bone upon the spinal cord, or the grey matter, would possibly by that time have produced such degeneration as to make it incapable of any recovery in the case.

Q. It is a fact that if there is any degeneration and lesion of the cord it is incapable of healing, is it not?

A. That is true of the grey matter and the spinal cord. Outside of that, where those little nerves run in, they are self-recuperating. They have a covering that protects and feeds them, so that they grow back together. For injury to the spinal cord, we know of no healing powers at all.

Q. And if there is a pressure upon it for two or three months, so as to produce degeneration, that could not be restored?

A. Yes, sir; there are different degrees of pressure, though.

Redirect examination:

Supposing that these characteristic symptoms of spinal trouble did not develop until June, then there was no pressure. Assuming that it developed in June, in my opinion, if they had gone immediately and tried to remove the pressure, relieve it, by taking out small bones, or pieces of bone, to relieve the pressure on the cord, in that event he would have recovered.

90 Recross-examination:

Yes, taking Dr. Fairweather's view, it would have been seriously critical.

Redirect:

Of course, the more of the backbone that was injured, the more serious and extensive would have been the operation. Assuming Dr. Fairweather was correct, the best thing to have done was to have removed the pressure immediately. If that is not done, the trouble continues.

Defendant rests.

Dr. F. S. HOPE, witness for plaintiff, being sworn, says:

Been living in Portsmouth a lifetime. Am a physician. Been in the active practice about twenty-five years. Was educated at University of Virginia and took a special course at Jefferson, and in a Philadelphia hospital. Yes, I know the plaintiff, Mr. Duvall. My first acquaintance with him was as an attendant at the King's Daughter's Hospital, going in and out. I saw him first as an inmate, but knew him to speak to him, and later on, in September, I attended him at his home, after he had left the hospital. Don't remember the date that I first saw him. It was through May, June and during the summer months. I made no examination of him then. It was only an observation. From that I gathered that he was just a helpless young man, unable to get around, as he had a chair on wheels and had to have a great deal of assistance, and I observed that he couldn't use his lower limbs. That was in May. Don't know how often I saw him from that on. I was in the hospital every day. Pretty days he was either out in the corridor or on the front porch, or anywhere in the institution.

91 Q. How was his condition when you first saw him as compared with his condition when you began to treat him as a physician? I mean as to observation?

A. One was only the observation of a man; the other was the examination of a physician. I first attended him as a physician in September, 1909; the latter part of September. Yes, I made an examination of him then. I, of course, am not a surgeon, only a general practitioner. I was called in to see Mr. Duvall in the latter part of September, 1909, examined him, and found what I considered at that time to be a fracture of the spine. I found it by examining him with my hand. He had deformity, pain, was very tender, and was paralyzed just below the seat of the injury. I went over the history of the case with him. (His Honor: Gen-

tlemen of the jury, the history of the case which this witness will give you, you will consider only as corroborative evidence, not substantive.) Always, on taking charge of any man, or any case, we make up what we call a history of the case; we take the name, age, occupation and general condition, the history of the man. He told me that on the 13th day of March, 1909, on the S. A. L. Railway, he was caught in a wreck, that he was in his car, precipitated upon his head; that he was thrown over some trunks, or something and that the pressure was on his feet, and that the injury occurred in that way. That he was taken to a hospital, in Monroe, I believe he said, and remained there ten days; that he had no feeling in his lower extremities, and that during the time when his leg was set, when it is usually so extremely painful to handle a fracture, that he had no pain whatever; that he was transferred from there to Portsmouth; that he remained in Portsmouth in a hospital in bed for some eight or nine weeks; that he had complained horribly of his back the whole time; that he would lose his feet and couldn't find them, except by looking at them with his eyes—that is what we call the taxit symptom, accompanies locomotor ataxia; he told me that he had that symptom; also of his inability to control his bladder, especially when he was asleep; I don't remember the date of that; I asked him what the

92 diagnosis was, had any been made, and he said "no;" I asked what treatment he had received, and he said some adhesive strips on his back. That was his history up to the time I saw him. I asked him, of course, when the first diagnosis was made as to the fracture. He told me it was made under the X-ray by Dr. Hunter, in Norfolk. Dr. Hunter is an X-ray specialist. He does it for all the professional men. The machines are expensive, and it takes somewhat of an expert to handle them. He told me that in that examination was the first time he had ever had any knowledge that he had a fracture of his back; that it absolutely astounded him. They keep a record in the hospital of patients, what is called a chart, giving his name any everything that is done for him. In making up a history of the case, I asker for the chart and have never been able to get it.

(Last part of testimony withdrawn by order of Court.)

Q. Whose duty was it to furnish that chart, if he was under the treatment of Dr. Holliday, at the hospital?

A. The nurse makes up the chart, under the doctor's direction.

(Defendant objects and excepts.)

He told me that the first time it had ever been diagnosed as fracture was at that time. That he had gone to Baltimore and seen both Dr. Thomas and Dr. Fairweather, and that their opinions in the matter corroborated that of the X-ray, and that their opinion was that he was irreparably injured. (Defendant objects; sustained; plaintiff excepts.) He then showed me letters from these men. (Defendant objects; sustained; plaintiff excepts.) That was about the history of his case. He then told me that one of the most dis-

astrous things that occurred to him, was that, occasionally, during the night, and he has had it since I have attended him, that his feet would fall out of bed and he wouldn't even know it; that particularly on one occasion they fell out and he complained horribly of pain in his back and called his brother in. (Defendant objects; sustained; plaintiff excepts.) That gave me a rather concise

93 history of him from the 13th of March up to the time that I saw him. At the time that I saw him, he was in a deplorable condition. I examined him, found a deformity, much tenderness in his back, his reflexes were exaggerated, co-ordinate muscle paralyzed in his lower extremities, inability to use them in any way except in concentrating his own mind upon it. I told him it would be necessary for me (and I wouldn't assume the responsibility of the case unless he allowed me to do so) to associate with myself a man of eminence. He said he was perfectly willing to do anything to get well. Dr. Gwathney happened to be in Europe and was coming home in a week. The matter was postponed until that time. Dr. Gwathney went over him very carefully and corroborated fracture of the spine. As to the extent of the fracture, he was so exquisitely tender and his reflexes in such condition that it was impossible to examine him with any degree of care at that time, or now. His muscles are almost like lockjaw muscles caused from the irritation of grey matter in the spinal cord. The history of the case has been progressive. From September, up until now, he is not as well, not as comfortable, and, as in nearly all spinal injuries, he has just slowly and surely drifted from bad to worse. He suffers more pain, has less ability to use his limbs, and his control of his bladder is not as good as it was. I advised him at the time, after with consultation with Dr. Gwathney, as to an operation, went over the whole ground with him, but knowing the gravity of it, I was perfectly fair with him, laid the whole case before him, and being unable to assure him, with any reasonable assurance, of relief, he declined it. Yes, as in my opinion, based upon what I have seen and read and know, operations upon the spinal cord, as was said here yesterday, are the gravest operations that surgeons have to contend with. They are dealing with tissue that is so tender that any interference with it means liability to development of meningitis or infection of the cord, which no man can say you will or will not

94 have. A man has to assume these risks, and if you are fair to him, you have to give him your opinion in the matter before discussing an operation. He is still under my supervision and care. My bill for services, up to this time, against the plaintiff, is \$800. That includes Dr. Gwathney's services. In my opinion, there is no chance for this man to get well. The history in such cases is that it is progressive. In my opinion, from my connection with the case, he has some injury to the cord, about on the line of his first lumbar vertebra. That is due, I think, to bony pressure from the injury received in the wreck, possibly some dislocation. I can't say how long this man will live. He is only twenty-six years old, and of splendid physique from his waist up. From there down he is a cripple. He might live fifteen or twenty

years. That is only a matter of opinion. Yes, he would continue to suffer all that length of time. He has drifted a little from bad to worse from September until now. I don't know about what amount of money he has expended for medicine since he was hurt. That is all I know in connection with the history of the case. I have known Dr. Gwathney practically a lifetime, except for the years that he has spent in Europe. As to his general character, I don't know a word in the English language that expresses it except "superb;" that will express it. His reputation as a surgeon is in keeping with his character.

Cross-examination:

I did not hear Dr. Gwathney testify yesterday that there was no way by which he could discover any injury to the spine. Didn't hear him say that he relied altogether on the symptoms of the trouble that were manifested and the history of the case, in order to give an opinion as to what he was suffering from.

Q. Did I understand you to say a while ago that you discovered, by a physical examination of the plaintiff's spinal column, a dislocation of the vertebra, or backbone?

A. No, I said it was due to pressure, more than likely. I 95 said that from the deformity, paralysis, and exquisite tenderness, I drew my conclusions. Don't know whether I could discover any deformity now or not. I can't examine him. I examined him in September and discovered a deformity then. By deformity, I mean that there is some curved and abnormal condition of the vertebrae. When I got to the fifth lumbar, I found that the spine was not in position.

Q. I ask you if you didn't hear Dr. Gwathney say yesterday that he couldn't discover anything by feeling of his back?

(Plaintiff objects.)

A. I don't think he said that. Don't remember how long he said he would probably live as the result of this injury. Don't think I heard him say. Part of the time I was in there with Mr. Duvall, undressing him, and he may have said those things at that time. Yes, I came here voluntarily as the physician of Mr. Duvall, to testify in this case. That is the only reason. I am not on friendly terms with Dr. Holliday, and have reasons for it. Can't explain why it is that I happened to become the physician of Mr. Duvall, who had been formerly treated by a man with whom I am not on friendly terms, except that Mr. Duvall sent for me once or twice. Don't remember who he sent. But at the hospital, once or twice he mentioned it to me himself, and I declined on more than once occasion. No, it would not be ethical for me to treat him while he was under another physician.

Redirect examination:

As to why I am not on friendly terms with Dr. Holliday, I do not care to say. I do not think that the personal differences of men should be aired here in Court.

Plaintiff introduces in evidence the book of rules of the Seaboard Air Line Railway, rule No. 578, governing the conduct of passenger conductors, as follows:

578. It is the duty of the passenger train conductors to pass entirely through their trains for the collection of tickets and fares, after leaving each station where the train stops; and where 96 stops are at long intervals, they must frequently pass through to look after the comfort of the passengers and to see that trainmen are performing their duty.

Plaintiff also introduces Rule No. 579, of the same rules, as follows:

579. Conductors must not permit any person, unless duly authorized, to ride upon the engine, or in the postal, baggage or express cars; nor must they permit any person to ride free upon any part of their trains except as provided in the rules governing free travel.

Plaintiff also introduced photograph of the wreck in which plaintiff was injured, it being admitted that this is a photograph made by a certain man.

Capt. Cox, witness for plaintiff, recalled, says:

Yes, I know Dr. Burke. I have met him. Yes, he was at Sanford while young Duvall was there. Yes, he made an examination of him.

Q. State about it?

(Defendant objects.)

Plaintiff proposes to show by this witness that Dr. Burke made examination of Duvall, and then proposed to show the evidences of young Duvall's condition disclosed by that examination by Duvall's own conduct at the time.

(Defendant objects; sustained; plaintiff excepts.)

Mr. J. A. DUVALL, witness for plaintiff, being sworn, says:

Have lived in Portsmouth for last six years. Was born and raised in Rutherfordton, N. C., until I was about twenty years old. I am the father of Ernest Duvall. Yes, I saw Mr. Rowe on the stand.

Q. Did you have any conversation with him at any time about what occurred in that express car. If so, what was it?

A. I asked him if Ernest took a drink of whiskey in the 97 car. I don't remember the date. He came to the house to see Ernest three or four times. It was either the first or second trip. He said "no." The only other statement I ever heard him make about it was in the car there that morning, last Monday morning. When we started up here, he was in the car at Portsmouth. Before we left there, Mr. Lyon was present and you (Mr. Douglas), Ernest, Capt. Cox and myself. I heard Ernest ask him if he was going up to Carthage, and he said "no, he couldn't go." Ernest asked why, and he said, "well, I couldn't do any good by going, and besides, I won't go without the advice of my attorneys. (Defendant objects.) I don't recall the exact conversation and what happened. I remember he said he couldn't go without the consent

of his attorneys, at Greensboro. I don't remember hearing them say anything about the express car that morning. No, I wasn't there the whole time. No, wasn't at the house the night that Mr. Lyon and Capt. Cox were there.

Cross-examination:

Can't remember the date that Mr. Rowe told me that Ernest didn't take a drink. I asked him about it because we had heard that he had, and my wife didn't believe it, and I didn't either, and I just asked him.

Mr. LYON, witness for plaintiff, being sworn, says:

I am a lawyer. Live at Raleigh. Was in Portsmouth recently. Went there last Saturday night, a week ago. Am the Mr. Lyon that was referred to by Mr. Rowe, who said that he, Capt. Cox and Ernest Duvall came to his house. I think it was last Thursday night a week ago, just before we ate supper, about half past seven, Capt. Cox, Mr. Ernest Duvall and myself, took a car and went to the home of

Mr. Rowe. Went within about two blocks of that home, I 98 take it, the car did. We didn't know where he lived and enquired, and someone told us. We went to his home. His brother came to the door and asked us in. Mr. William Rowe came in the room and his brother went out. Capt. Cox introduced me to Mr. William Rowe and at the time told him that he expected his (Capt. Cox's) case and Ernest Duvall's would come up this week in the Carthage Court. I told Mr. Rowe that I was one of the attorneys for both Capt. Cox and Mr. Duvall, and I asked him if he would mind telling us how the wreck occurred, what happened just before it, and what happened right after it. At first he didn't want to talk. He said he didn't know what he had done, that is, he didn't know whether he had instituted suit against the company or not; that he had gone to see some attorneys in Greensboro, Messrs. Stedman and Cook, and he didn't know what the status of his case was; that he had no special engagement with us and that he didn't feel like talking to me about it at the time. He told me that if his attorneys would advise him to talk with me about it that he might do it. I asked him then to tell me what happened on the train, just before the wreck. He didn't want to tell me that, and after talking with him about other matters, and asking him the same question again, he finally told me (*a*). He said they were a short distance south of Raleigh, and he thought he heard something or somebody get up on his car, on the front of the train, and he didn't know what it was; that he then went to the baggage car and asked Mr. Ernest Duvall (*b*).

(Defendant objects to and asks of the Court to strike out so much of the testimony as appears between the letters "*a*" and "*b*." Objection overruled. Defendant excepts, which is defendant's tenth exception.

Exception No. 10.

where the captain was and he said, "I reckon he is up in the train taking up tickets." Mr. Rowe says, "when he comes down, tell him to come to the express car." He said, "all right." That

99 a few minutes later the captain came into the express car, with

Mr. Ernest Duvall with him, just behind him; that as soon as they got about the middle of the express car, Captain Cox was in the act of sitting down, or had sat down, on an iron box; he said that that was the box they carried the valuables in, an iron box with handles to it, and that about that time the collision occurred (c). I asked him if they drank any whiskey in that car, or at any time while on duty, and he said that he had not, and neither of the other men had. He said if the railroad claimed any such defense as that, that there wasn't a word of truth in it (d). He said, none of us took a drink that night, and we never took a drink at any other time on that car." I then asked him about the wreck, as to how the cars were broken up * * *

(Defendant objects to and asks the Court to strike out so much of the testimony as appears between the letters "c" and "d." Objection overruled. Defendant excepts, which is defendant's eleventh exception.)

Exception No. 11.

Then he told me that, I think a week before, he had been down to see Mr. Ernest Duvall, and I asked him if he saw the picture of the wreck that Mr. Duvall had * * *

(Defendant objects. Withdrawn.)

Cross-examination:

He told me that Messrs. Stedman and Cook, of Greensboro, were his attorneys, and that he didn't think he ought to talk about the matter until he had consulted with them. Yes, I think it was professional for me, as a brother lawyer, after this man had told me that he would not talk without the consent of his lawyers, to insist on his doing so. His brother came in about that time and his brother tried to get him to talk about it. I don't remember his name, but he said * * * I think it was professional
100 for me to do so, because I didn't make him tell me. He did it voluntarily. Yes, I said we talked about something else and then came back to this subject. Didn't do that for the purpose of getting an unwilling man to make a statement for me. Yes, I did ask him several times. Yes, I am an attorney in this case and have an interest in it. Don't wish to tell how much interest I have. (Plaintiff objects and excepts.) Mr. Rowe's brother came in the room and tried to get Mr. Rowe to tell him how it was. He told him what he had told me. And this other Mr. Rowe, I don't remember his name, but he said * * *

Redirect examination:

Yes, this man was in the State of Virginia. There was no process of law by which we could subpoena him here.

(Plaintiff offers in evidence the answer filed by the receivers of

the S. A. L. Railway in this case. Defendant objects on the ground that the receivers were not the agents of the company, but of the Court. Evidence excluded. Plaintiff excepts.)

Capt. Cox, recalled by plaintiff, says:

Yes, I went with Mr. Lyon and Ernest Duvall to the house of William Rowe, on last Thursday night. He said he asked the baggage master where I was, and that the baggage master said I was in the rear part of the train, somewhere, he didn't know where, and he said, "when he comes up, tell him I want to see him," and the baggage master told me that. I said to him, "come on and let's go see what he wants." Yes, I had a conversation with Mr. Rowe at his house. We went to his home and I introduced Mr. Lyon to him. I said, "William, this is one of the attorneys; I don't think my case is coming up, but Ernest's is," and I said, "I understand the railroad is going to prove a whole lot of lies; that we were in

there stealing whiskey and drinking it, and all that, and that 101 is not true." He hung his head down and didn't know what

to do. His brother came in with his little baby there that was running about, and William said, "I haven't any engagement with you gentlemen," and he talked like he was half crazy to me. I said, "William, you ought not to be afraid to tell the truth about this matter." And he said, "No, I haven't got an engagement." I said, "Haven't you sued the railroad?" and he said, "I don't know whether I have or not. I said, "You don't know that?" He said, "Yes, I reckon I have." I said, "Can't you tell me?" and he said, "No, he couldn't tell us without the permission of his attorneys, Stedman and Cook." I asked where he had entered suit, and he said in Lee County. When we started to leave, he told Mr. Lyon that he didn't know that if he could do us any good if he came down here, but he didn't like to do it; that he had not heard from his attorneys, and he said, "About that whiskey drinking, you know there wasn't nothing in that. I didn't drink any whiskey in that car that night and never have." Yes, he stated in that conversation why he had sent for me. Said he thought he heard some one on the train, on the front end of the car. He sent Mr. Duvall, the baggage master. No, siree; neither Mr. Duvall nor myself drank any whiskey on that occasion in that *that* car; absolutely no. I never drank any whiskey that night, or any other night, when on duty.

Cross-examination:

Yes, he said he heard a noise up on the front of the car and thought somebody was up there. Yes, that train was running pretty fast. I can't testify as to whether he could hear anybody on the car. Yes, so far as I know, there were only the three of us in the car at the time of the accident. Yes, I knew I didn't drink any whiskey; I suppose Duvall knew I didn't drink any. No, I had not had any conversation with William Rowe about it before. And yet

I tell the jury that we three were in there, and that I knew 102 Duvall didn't drink any whiskey and he knew that I didn't drink any. I went there to try to prove that there wasn't

any whiskey drunk because I had been hearing for six months that the railroad company was going to try to prove a whole lot of lies about our stealing and drinking whiskey there, and I wanted to prove that they were lies.

(Defendant objects.)

Q. But you knew that you had not drunk any whiskey?

A. Yes, sir.

Q. And Ernest knew you hadn't drunk any, and both of you knew the other had not drunk any?

A. Yes, sir.

Q. Then why did you go there to try to prove that there was not any whiskey drunk?

A. Because I had been hearing for six months that you all (pointing to the counsel who was cross-examining him) were going to try to prove a whole lot of lies about our stealing and drinking whiskey there, and I wanted to prove that they were lies.

(At this point the counsel made toward the witness, in a threatening manner — rose up and was in the act of striking counsel with his stick, when another counsel came between the parties and prevented his doing so.)

The defendant, thereupon, objected to the witness' answer, and his demonstration in open court, as being highly prejudicial to the rights of the defendant before the jury, and moved that a juror be withdrawn and a mistrial ordered? The Court took the matter under advisement and stated that he would pass upon the motion the next morning. The witness before his testimony was *constructed* at this point apologized to the counsel and the Court, and stated that he did not mean to make the charge against the counsel.

No, after Court adjourned today, I did not go out, and with an oath, cuss at this man * * * because of his evidence. As well as I remember, I said to him, "Ed, don't you remember telling me and Mr. Duvall that the baggage car was tore all to pieces." He said,

"No, I don't remember that." I said, "You certainly did, 103 and you told Mr. Douglas that the car was torn all to pieces," and I told him that he ought to be ashamed of himself for testifying against that poor boy.

Q. I ask you if you didn't go to him and say, * * * "You, what did you testify to that for?"

A. No, sir, I said, "Ed, didn't you tell Mr. Duvall, Mr. Douglas and myself, that the baggage car was torn all to pieces?" He said, "No, he didn't say that." I said, "Didn't you tell Mr. Douglas that?" and he said that he didn't remember. I said, "Ed, you certainly did tell us, and you ought to be ashamed of yourself for not testifying to it." He said, "You will have to excuse me, you know I am hurt and all messed up." I told Dr. Hope about it, and I said, "I spoke too quick; I am going back to him and apologize to him."

Q. If that thing happened the way you have stated that it happened, don't you know there wasn't anything in it that could have been offensive to this young man?

A. Well, I did speak rather quick, and I was wrong. I had no business doing it.

The Court here took a recess until Saturday morning at nine o'clock.

(The defendant here renews its motion, made on the previous afternoon, to withdraw a juror, because of the misconduct of the witness Cox while upon the stand in charging that the defendant and its counsel had been concocting lies to prejudice the witness and the plaintiff, and because of what transpired as the result of said charge. The motion was overruled and the defendant excepted, which is the defendant's twelfth exception).

(His Honor to the Jury: Gentlemen of the jury, what the witness Cox said yesterday evening, about the defendant's having tried to get a lot of lies before the jury in this case, you will not consider. That was a very improper remark for him to make, and you will not consider it at all in the further investigation of this case, or let it influence you one way or the other in your verdict. The

little episode that followed, you will not let that prejudicee
104 your mind- against the defendant or the plaintiff in this case, as they were in no way responsible for it—neither the defendant nor the plaintiff).

Mr. ERNEST DUVALL, plaintiff, recalled, says:

The first attempt I made to take a step after my injury in the wreck, was about two months afterwards, I think; two months after I got to the hospital in Portsmouth. I was in the hall one day on my crutches and Dr. Holliday was there. He says to me, "Ernest, why don't you try to walk?" I said, "I can't walk." He said, "You don't do anything but slide along." He said, "Try to take one step before the other." I tried, and when I did, I liked to have fallen backwards. He said, "That will do, sir; that will do." I didn't try any more after that. Miss Douglas and Miss Gumm were the two nurses present. Dr. Holliday first suggested an operation to me three or four months after I was injured. Just immediately after the X-ray was put on my back. That is the first time he ever made the suggestion. At no time since the wreck have I ever been able to place one foot before the other and make a step. Never tried it but this once that he compelled me to do so. I think the first time I left the hospital was May 30th. Up to that time Dr. Holliday had not advised an operation. He never told me what was the matter with me. I have asked him repeatedly, a number of times, and he never said. As to what Dr. Holliday said to me about the plaster cast, he said he wanted to take that cast off before I left the hospital, and I told him I didn't want him to take it off, and I asked him when I could go home. He said, "You can go any time when you get ready, but I want to take the cast off." He said, "If you go, you will go against my wishes with that cast on." I said I didn't feel that I wanted to take it off because the man in Baltimore advised me to keep it on and I wanted to do so. Yes, I went down to

Mr. Rowe's house with Mr. Lyon and Captain Cox, last Thursday night. We went into Mr. Rowe's home and met him and his brother, I think. Captain Cox introduced him to Mr. Lyon and told him that Mr. Lyon was representing our case and would be glad for him to come down for me as a witness, to tell what happened. He didn't say anything for a long time, and then he said, "Mr. Lyon, I haven't got instructions to talk to you, sir," and it made me feel right bad * * * (Defendant objects.) I said, "William, won't you go down for me as a witness in regard to this matter?" And he said he didn't feel like talking unless his attorneys gave him the right to, and then I asked him permission, if Mr. Lyon would wire to his attorney asking if he (Mr. Rowe) might come down as a witness for me, and he said, "Yes, with permission, he would come." We talked about other things, and after a while Mr. Lyon asked him, "Mr. Rowe, I understand that Mr. Duvall and Mr. Cox were drinking whiskey in that car the night of the wreck. Was there anything to that?" He said, "No, sir; not a word of truth in it. I never saw either one of them take a drink of whiskey in my car that night."

Q. Did you hear any statement made by Mr. Rowe last Monday morning at Portsmouth in the presence of myself (Mr. Douglas) and Captain Cox and you? In the chair car?

A. Mr. Cox wasn't present. Your wife, my father and you were present. You spoke to Mr. Rowe and asked him how he was, and we talked a few minutes, and I asked if he was going down with me, and he said, "No," that he hadn't heard from his attorneys, and you, Mr. Douglas, said: "What about this whiskey business that I hear?" And he said, "There isn't a word of truth in it." That is about what was said, as I remember.

Q. Was there anything said of an attempt at an arrangement to be made by you, in the presence of Mr. Rowe, at Sanford, about what he should swear in the suit, and about sticking together?

A. There was a little conversation after the wreck; we were talking about it, and the conductor asked, William, what did you want with me in your car?" And he said—

106 (Defendant objects; sustained; plaintiff excepts.)

Q. State if anything was said in Portsmouth as to what he wanted with you in the car?

A. Yes, sir; he asked me—

(Defendant objects. Question withdrawn.)

Q. What did Mr. Rowe say in the conversation at Sanford with reference to what Mr. Rowe testified to here on the stand?

(Defendant objects. Question withdrawn.)

Q. What was the conversation between you and Cox and Rowe, at Sanford, in reference to why Rowe sent for Cox?

(Defendant objects. Question withdrawn.)

Q. What did Rowe state in the conversation at Sanford?

(Defendant objects. Question withdrawn.)

Q. Mr. Duvall, Mr. Rowe testified yesterday, in your absence as I have it, that in a conversation between him and you and Mr. Cox, that Cox said at Sanford, in the hospital, that Rowe had sent for him because he thought that someone was on the front end of the car, and suggested to Mr. Rowe that that would be a good proposition for you all to adopt for the reason for your being on the front car; state whether or not a conversation of that kind was had between you?

(Defendant objects; overruled; defendant excepts, which is defendant's thirteenth exception.)

Exception No. 13.

A. No, sir; there was not.

Q. Mr. Rowe said that, in that same conversation some one, or all of you, said it was unfortunate that you had taken a drink in the express car. Was anything of that kind said?

(Defendant objects; overruled; defendant excepts, which is defendant's fourteenth exception.)

A. No, sir; there was not.

Q. Mr. Rowe stated in his testimony, in your absence, that you came into the car shortly after you left Raleigh, and was 107 helping him in the express car, and that you had been in there for some time, before the wreck, and that he had invited you in the car at Johnson street station, Raleigh. Is that true?

(Defendant objects; overruled; defendant excepts, which is defendant's fifteenth exception.)

A. No, sir; that is not exactly the way it happened. My leg was set at Sanford by Dr. Monroe, and I think Dr. McLeod and Dr. McIver. I think there was three of them there at the time. No, the large, fat doctor, Dr. Will Monroe, was not there at the time it was set. Yes, I swore on direct examination that Dr. Will Monroe set my leg. I won't be positive that both of them were there but one of them was. I didn't see Dr. Will until that night. I think it was that night.

Cross-examination:

I have known William Rowe about five years, I think. Yes, we were very friendly. Was intimate enough with him to call him by his first name. Don't know just how long we have been running together on the road; for some time. There are a great many messengers on the run. I went down to his brother's house last Thursday night to ask him would he come as a witness for me. My attorney, Mr. Lyon, and my friend, Mr. Cox, went along. No, I didn't think it necessary for me to go. I just went along; just wanted to talk with him. He had been to see me and I wanted to see and talk to him. Just a sort of a social visit. My attorney asked to talk to him. Yes, I walked from the street car to his house; it is only about two blocks.

Q. I understand you to say that Mr. Lyon said he heard that

you and Cox were drinking in Mr. Rowe's car. Is that what Mr. Lyon told Mr. Rowe, that he heard it?

A. Yes, sir.

Q. Well, did you experience any difficulty in walking from where the car line stopped down to his house, with your crutches?

A. Yes, sir; I did. No, I don't go around that way all over Portsmouth. Haven't been up town more than three times, three or four times. That was to see Mr. Stanley twice and to see the doctor. No, I was not particularly anxious to see Mr. Rowe that night, but I was up there attending to my other business, and while I was up town, I just went down with them. Yes, I go out to the park in Portsmouth. Yes, so far as my physical condition is concerned, from my waist up, I seem to be as healthy as I ever was. I eat fairly well; not as well as I have been. No, I am not better now than I have been for some time; do not suffer less pain. Yes, with assistance, I go to the table and eat my meals just like anybody else. I don't have to have assistance in eating, but in getting to and from the table, and have some one to hand me my crutches.

Q. With reference to that cast that you talk about—Dr. Holliday told you that the reason he didn't want you to leave the hospital with the cast on was because of the fact that you were going from under his care and he didn't want you to go to any other doctor with it, didn't he?

A. Well, it was something like that. He said he didn't want me to leave the hospital with his treatment on. I said, "Why, this was the advice of Dr. Fairweather." Dr. Holliday helped to make the cast. I presume it was made under his direction and supervision. Yes, I have it on now.

Redirect examination:

Q. Mr. Cansler asked if you walked from the car to Mr. Rowe's house. What do you mean by "walking"?

A. Just as I do now; put my crutches down and drag my feet. Can't use my right foot at all. Can barely get along at all.

Mr. MERCHANT, witness for plaintiff, being sworn says:

Am a photographer. Yes, visited the scene of the wreck at Sanford on the morning immediately following the night of the wreck.

109 Q. Look at both these photographs, and say if you would recognize them as the scene of the wreck.

By DEFENDANT'S COUNSEL:

Q. Did you take that picture?

A. No, sir.

(Defendant objects.)

Yes, I have some pictures that I did take on that occasion. Yes, I took that picture; on the occasion I mentioned, the morning after the night of the wreck. Yes, it is a correct picture.

(Plaintiff offers picture in evidence, marked "Exhibit A.")

Yes, I made that picture, too. That is from another point of view and is also a correct picture.

(Picture marked "Exhibit B" and offered in evidence by plaintiff.)

Cross-examination:

The photograph, "Exhibit A," is a photograph of the tender of the passenger train engine, and of the boilers of both engines which were in the wreck. "Exhibit B" was intended to be a general view of the wreck, from the south, or Sanford end, looking towards Raleigh. It really shows, in an indistinct way, owing to the failure of the photographic apparatus to work, a general view of the wreck, this on this side being the tank of the freight engine, and the wreckage distributed on the way. It gives no distinct idea of it.

Redirect examination:

Yes, I made quite a number of photographs of the wreck, but they were worthless, owing to the fact that I was using a new instrument at the time and it was in bad adjustment. Those are the only two that I now have.

Mr. LAND, witness for plaintiff, being sworn, says:

Was a passenger on the train that was wrecked that night. I took Mr. Duvall out of the wreck. I heard him under this 110 car and went in. Didn't know who he was. Pulled him to the outer edge, a small space between the ground and the car and asked the parties on the outside to take him further away, so I could get others out that were complaining underneath, and they didn't do it, wouldn't do it, so I pushed by him and pulled him out on the edge myself and he complained very much of his back and begged to be shot at the time. Well, this car, underneath, there, there was only a small opening where these three men were; but I worked in the dark, and as soon as I got this man out, I went back into the sleeper and went to bed. It was drizzling rain and I was wet and cold.

Cross-examination:

Mr. Duvall said he wanted to go back and help the Captain out. The parties tried to take him out and he said "No, let me alone; I am going back to help the Captain out." Yes, he complained of his back. I don't remember his complaining about his leg. Yes, I know Mr. William Rowe. Known him for two or three years. Think his general reputation is good.

Redirect:

Can't say that I knew Mr. Ernest Duvall up to this time.

Q. You say you know Mr. Rowe's character is good. Did you hear him admit on the stand that he violated the company's rules by taking a drink in the car? Would you say his character is good now?

A. I would say he was imprudent in that respect; I have known many good men to take a drink of whiskey.

Plaintiff offers in evidence article three of the defendant's answer, as follows: "But it admits that it was due to the carelessness of one or more of their employees in failing to properly protect said passenger train from the collision with said freight train."

Plaintiff introduces in evidence the mortuary tables.

111 Mr. DUVALL, plaintiff, recalled, says:

No, Dr. W. A. Monroe did not go down and make another examination of me yesterday, or at any other time since I have been here. Yes, I know who porter was on that train that night; John Hicks. He is over there in the courthouse now. No, I did not have him subpoenaed here.

Cross-examination:

A. Yes, John is a colored man.

Plaintiff desires to introduce subpoenas in the case showing that the defendant has subpoenaed John Hicks. Defendant's counsel states that no such subpoena was issued by defendant.

Plaintiff closes.

Plaintiff tenders only two issues, the first and the third of the usual three issues, and asks that his Honor will answer the first issue in his charge to the jury.

His Honor states that he will submit three issues to the jury. Plaintiff excepts to the submission of the second issue, as to contributory negligence.

Instructions Prayed by the Defendant.

NORTH CAROLINA,

Moore County:

In the Superior Court, January Term, 1910.

(Title of Cause.)

At the conclusion of the entire testimony the defendant in apt time prayed the Court in writing to instruct the jury as follows:

1. That where an employee undertakes to do something not his duty to do, the master is not negligent; and if the jury shall 112 find by the greater weight of the evidence that the plaintiff was acting outside of the scope of his employment when he was injured, they will answer the first issue "No."

His Honor refused to give this instruction and the defendant excepted, which is the defendant's sixteenth exception.

Exception No. 16.

2. If the jury shall find by the greater weight of the evidence that the plaintiff went into the express car to assist the express messenger in his work, and while there was injured, as the result of the derailment of the said car, then the defendant's negligence would not be the proximate cause of his injury, and the jury will answer the first issue "No."

His Honor refused to give this instruction and the defendant excepted, which was the defendant's seventeenth exception.

Exception No. 17.

3. That as the plaintiff admits he was in the express car at the time of his injuries, and as the rules of the receivers of the defendant (of which he admits he had notice) required him to remain in the baggage car when not engaged in flagging the train, the burden is upon the plaintiff to satisfy the jury by the greater weight of evidence, that when he went into said express car, and was injured, he was engaged in the discharge of the duties of his employment, and if he has failed to so satisfy the jury, you will answer the first issue "No."

His Honor refused to give this instruction and the defendant excepted, which is the defendant's eighteenth exception.

Exception No. 18.

4. That unless the jury shall find by the greater weight of the evidence that when the plaintiff went into the express car, he understood that he was going there to discharge some of the duties of his employment, the defendant's negligence in causing the derailment of said car would not be the proximate cause of the plaintiff's injuries, and the jury will answer the first issue "No."

His Honor refused to give this instruction and the defendant excepted, which was the nineteenth exception.

Exception No. 19.

5. Although the jury shall find that the plaintiff, in fact, went into the express car at the request of the conductor, yet unless they shall further find by the greater weight of the evidence that he went because he thought it was his duty to go in obedience to the conductor's orders and not because he was being invited to go to gratify his idle curiosity, the jury will answer the first issue "No."

His Honor refused to give this instruction, and the defendant excepted, which is the defendant's twentieth exception.

Exception No. 20.

6. The admitted rules of the receivers of the defendant required the plaintiff to remain in the baggage car when not engaged in flagging the train, and the plaintiff had no right to go into the express car in violation of the provisions of the said rules, unless the conductor ordered him to do so for the purpose of discharging some one of the duties of his employment; and unless the jury shall find by the greater weight of the evidence that when the conductor told the plaintiff to go with him into said car, he thereby understood that the conductor wished him to go to discharge his duties as an employee of the defendant, the jury will answer the first issue "No."

His Honor refused to give this instruction and the defendant excepted, which was the twenty-first exception.

Exception No. 21.

7. That if the jury shall find by the greater weight of evidence that the plaintiff went into the express car to assist the express messenger in doing his work, and while there was injured as the result of the derailment of the car, then the defendant's negligence in causing said derailment would not be the proximate cause of the injury, and the jury would answer the first issue "No," even though they might believe that if the plaintiff had remained in the baggage car he would have been injured in the way he was injured, as their belief would be a mere conjecture which is insufficient to support a verdict.

His Honor refused to give this instruction, and the defendant excepted, which was the defendant's twenty-second exception.

Exception No. 22.

114 8. The plaintiff sues to recover damages for certain specific injuries set out in the complaint, and before he will be entitled to your verdict, he must satisfy you by the greater weight of the evidence that he suffered those specific injuries, as the result of the negligence of the defendant's receivers. This being so, unless the jury shall find by the greater weight of the evidence that the plaintiff was not in said express car to assist the messenger in doing his work, they will answer the first issue "No," as there is no evidence in this case from which they would be warranted in finding that if the plaintiff had remained in the baggage car he would have suffered the same injuries he did suffer, as the result of the derailment of the express car.

His Honor refused to give the foregoing instructions, except as appears in his general charge, and the defendant excepts, which is the defendant's twenty-third exception.

Exception No. 23.

9. That if the jury shall find by the greater weight of evidence that the plaintiff went into the express car to assist the messenger in doing his work and while in said car was injured in the spine and leg, as the result of the derailment thereof, due to the negligence of the defendant's receivers, yet, such negligence would not be the proximate cause of the injury, unless the jury shall further find that if the plaintiff had remained in the baggage car he would have suffered substantially the same injuries, he would sustain as the result of the derailment of the express car.

His Honor refused to give this instruction, and the defendant excepted, which was the defendant's twenty-fourth exception.

Exception No. 24.

The plaintiff offers two issues, as to the negligence of the defendant, and as to damages, and asks that the Court answer the first issue in favor of plaintiff. His Honor states that he will submit the three issues tendered by the defendant, as to negligence of the defendant; as to contributory negligence of the plaintiff; and as to damages.

115 The plaintiff objects to the submission of the issue of contributory negligence of the plaintiff, objection overruled, and the plaintiff excepts.

Judge's Charge.

GENTLEMEN OF THE JURY: It has been agreed by counsel in the case that the Court need not read the stenographer's notes of the evidence. It is your duty to remember the evidence, and to find the facts from the evidence as you remember it. You are the triers of the facts, you will take the law from the Court and apply the principal of law that the Court will lay down to you to the facts as you find them from the evidence as you recollect it.

In passing upon and considering this evidence, gentlemen of the jury, the evidence offered as to the good character of the witnesses is not substantive evidence of the facts at issue, but it is corroborative evidence, offered for the purpose of better enabling the jury to pass upon the truthfulness of the witnesses that testified, and whose character was proven to be good. The evidence offered of contrary statements made by witnesses who have testified is not substantive evidence, but is evidence offered for the purpose of discrediting the witness, and thereby better enabling the jury what weight to give his testimony in the case. The testimony offered of statements made by witnesses the same is testified to here, is corroborative, and not substantive evidence. You are to pass, not only upon what the witness said, but upon the truthfulness of their testimony. In passing upon the truthfulness of their testimony, you will consider their demeanor upon the witness stand, their interest in the result of your verdict, if they have any interest, and the opportunities that they had of knowing the facts that they testified to, and the reasonableness of their testimony. All this you will do for the purpose of arriving at the truth.

116 Now the plaintiff in this case contends that he was injured by the negligence of the defendant railway; he contends that he was in the employ of the defendant railway company as its baggage master and flagman, and that, while in the employ of the company, on the occasion of this wreck, that he was told by the conductor of the train to come and go with him (the conductor) into the express car, and that he did so, following behind the conductor, and that, soon after he got in the express car, this accident occurred. The plaintiff further contends that it had been the custom for him to carry baggage in the express car; he further contends that it had been his custom to go in there when he pleased, and that this custom was known to the officers of the company. He further contends that he was not negligent in going into the express car on this occasion, and that no act of his contributed to his injury, and he asks you to return a verdict in his favor, and to award him damages for the injury he has sustained. He contends that he is twenty-five years old, and that his expectancy would be about thirty-nine years; that at the time of the injury he was getting \$50 a month, and that he would reasonably expect to earn

that much the balance of his life; that he was in good health and a boy of good habits, and that you should take this into consideration in passing upon the question of damages.

The defendant contends, gentlemen of the jury, that it is not liable to the plaintiff in this case in damages. Defendant admits that the act of the trains running together, the collision, was negligence on the part of some of its servants, but the defendant contends that this negligence of its servants, in permitting or causing the trains to run together, was not the proximate cause of the plaintiff's injury. Defendant contends that he (plaintiff) was in a place that he had no right to be; that he was in the express car when he was baggage master, and that the rules of the company under which he was working and employed, forbade his going into the express car,

and that if he had been in the baggage car, and not in the
117 express car, he would not have been injured; that it was his own negligence in leaving a place safer than the express car that brought about and caused his injury; defendant further contends that the plaintiff has not been injured as much as the plaintiff contends that he has; that the plaintiff should have submitted to an operation which would have reduced the amount of his injury, and, consequently, the amount of damages, that he has suffered in damages, by reason of the negligence of the company. These are about the contentions of the defendant.

Now, gentlemen of the jury, negligence is the failure to do that which a reasonably prudent man would ordinarily have done under the circumstances of the situation, or the omission to use means reasonably necessary to avoid or prevent injury to others. To establish actionable negligence, plaintiff is required to show by the greater weight of the evidence that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed the plaintiff under the circumstances in which they were placed, proper care being that degree of care which a prudent man would have exercised under like circumstances and charged with a like duty; and it must appear that such negligent breach of duty was the proximate cause of the injury.

Proximate cause, is the cause that produces the result in continuous sequence, and without which it would not have occurred and one from which any man of ordinary prudence could have foreseen that such a result was probable, under all the facts as they existed.

There are three issues submitted to you, gentlemen. They are as follows:

1. Was the plaintiff injured by the negligence of the defendant?

Now, the burden of that issue is on the plaintiff, and the plaintiff must satisfy you by the evidence, and the greater weight thereof,

that he was injured by the negligence of the defendant, and

118 that the defendant's negligence was the proximate cause of

his injury. Gentlemen of the jury, in passing on that issue, as I said, defendant admits its negligence, but denies that its negligence was the proximate cause of the plaintiff's injury, and contends that the proximate cause of the injury was his going into the

express car, and not the negligence of the defendant (*a*). If you find from the evidence, and the greater weight thereof, the burden being on the plaintiff, that the plaintiff's injury was caused by the defendant's negligence, proximately caused, you should answer the first issue "Yes." If you do not so find, you should answer it "No" (*b*).

To that part of the charge which is embraced between the letters (*a*) and (*b*), the defendant excepted, which is the defendant's twenty-fifth exception.

Exception No. 25.

2. Was the plaintiff's injury caused by his contributory negligence?

Contributory negligence is such an act or omission on the part of the plaintiff amounting to a want of ordinary care, as, concurring and co-operating with some negligent act or omission on the part of the defendant, makes the act or omission of the plaintiff the proximate cause or occasion of the injury complained of. Proximate cause means direct cause, that cause which produces the result without any other supervening cause bringing about the injury.

(*c*) If you find from the evidence that the plaintiff had no right to go into the express car, that he was not where he should have been, and you further find that he would not have been injured but for his going into the express car, and that his going into the express car was such an act on his part that a reasonably prudent man ordinarily would not have done under the circumstances of the situation, then he would be guilty of contributory negligence and it would be your duty to answer the second issue "Yes." If you do not so find, it would be your duty to answer the second issue "No" (*d*).

To that part of the charge which is embraced between the letters (*c*) and (*d*), the defendant excepted, which is the defendant's twenty-sixth exception.

Exception No. 26.

119. If you answer the first issue "Yes," gentlemen of the jury, and the second issue "No," or the second issue "Yes," under the view that I take of the law in this case, you will consider and answer the third issue as to damages—

3. What damage, if any, is plaintiff entitled to recover?

The burden of that issue is on the plaintiff. The burden of the second issue, which I have just read to you, as to contributory negligence, is on the defendant. If the defendant shall satisfy you from the evidence, and by the greater weight thereof, that the plaintiff was guilty of contributory negligence, and you should answer the second issue "Yes"; if the defendant has not so satisfied you, it would be your duty to answer the second issue "No."

The burden of the third issue is on the plaintiff. The plaintiff must satisfy you, not only as to the extent of his injury, but as to the amount of damages that he has received in consequence of such injury, that he has received by reason of the negligence of the defendant company. As I told you, the burden of the third issue is on the plaintiff to satisfy you by the greater weight of the evidence

that he has been injured, and as to the extent of the injury, and of the damages he is entitled to recover, if he is entitled to recover damages. If you find from the evidence, and by the greater weight thereof, that he is entitled to recover, then he is entitled to a fair and reasonable compensation for the injuries he has sustained. He is entitled to recover nothing by way of punishment to the defendant. In considering what is a fair and just compensation, you have the right to consider his incapacity for earning his living, if you shall find that he has been incapacitated in consequence of his injury; also any physical pain and mental anguish that he has suffered as the result of his injury which was proximately caused by defendant's negligence. These are the elements that would enter into your consideration of the question of damages. In considering his incapacity for earning a living, if you find he is incapacitated,

120 and having determined that, he will be entitled to recover

the present value of the difference between what he would have earned had he not been injured and what he is able to earn in his present condition. The mortuary tables are to be considered by you as to what would be his expectancy of life, but the mortuary table is not conclusive. You have the right to take into consideration his age, health, habits, circumstances bearing upon his health, in order to determine the probable length of his life if he had not been injured, and, taking all these things in connection with the evidence as you recollect it, you will determine what is his expectancy, and then what will be a reasonable compensation for his injuries, if you shall find that he has been incapacitated to earn a living; and then you will undertake and determine what would be the present value of such amount. You also have the right to take in consideration any physical pain and suffering, and the mental anguish he has suffered, as the direct result of the defendant's negligence.

If you answer the second issue "Yes," then on the question of damages, the Court charges you that, in an action like the one being tried, if the jury shall find from the evidence that the plaintiff, an employee of the defendant company, was guilty of contributory negligence, that is that he contributed to his own injury, such negligence would not bar a recovery if the defendant was guilty of negligence also, but the damages which the jury shall, under the evidence assess to the plaintiff, shall be diminished in proportion to the amount of negligence attributable to the plaintiff.

Now, gentlemen of the jury, you find these issues and answer them as you find the facts to be. It is late Saturday afternoon, but you have a duty to perform, a duty to yourselves, because you have taken an oath. The Court knows that we are all tired. I am tired myself. This case has occupied some time, but perhaps not too much. Nobody can be blamed. The parties had a right, and it

121 was their duty to offer to the jury all the evidence that they had to throw light upon this matter, and it is your duty, now gentlemen of the jury, to go out and fairly and patiently consider the case, without regard to the time of day or the day of

the week. The Court can continue until next week if necessary. An important case like this one should have the impartial consideration of the jury. If the Court has committed any errors in laying down the law, the Court can be corrected; but, gentlemen of the jury, there is no appeal from your verdict. Your finding of the facts is final; so it is more necessary for you to be right than for the Court to be right. The sheriff will make you comfortable, and, if necessary, will provide you with a place to sleep and something to eat. I am not telling you to take unnecessary time. I am just cautioning you, gentlemen of the jury, that the Court is not in a hurry. The Court will remain over during the next week if necessary. I want you to give this matter a fair and impartial investigation. Write your answers to the issues.

The Court here inquired of the counsel for both plaintiff and the defendant if they desired any further instructions to the jury, or wished any particular phase of the evidence commented on before the jury, or if there were any further instructions desired upon any line, to which counsel for both plaintiff and defendant said there was not.

By the COURT:

Give the issues to the jury.

The defendant has asked me to give you certain special instructions. Those that I give I will now read to you.

The Court then read instructions Nos. 10, 11 and 12 to the jury, as follows:

10. Further, if the jury shall come to consider this issue as to damages, they will only allow the plaintiff such an amount as they shall consider one reasonable compensation for his loss of earning capacity, and his physical and mental suffering, resulting from the injuries they may find he sustained as a direct and proximate result of the negligence of the defendant's receivers; and in fixing this amount the jury will not add anything thereto on account of the probability of the plaintiff's life being shortened on account 122 of his injuries, as he is not entitled to recover anything in this action for the loss of life resulting from said injuries. But the jury will consider the evidence tending to show that the plaintiff's life will probably be shortened on account of said injuries in ascertaining the time he will probably have to suffer, and the consequent amount of damages he would be entitled to recover therefor, as he would not be entitled to recover as much damages for suffering a short time as he would for a longer time.

11. After the plaintiff was injured it was his duty to exercise the care which an ordinarily prudent man similarly situated would have exercised to relieve his suffering, and, as far as possible, avoid the consequences of his said injuries, for the purpose of reducing his damages. And if the jury shall find, by the greater weight of the evidence, that when the plaintiff first discovered that his spine was injured, it was proposed to him by the defendant's surgeon that a surgical operation be had for the purpose of relieving his suffering and diminishing his injuries, and that if he had sub-

mitted to said operation, the same would have proved successful and his suffering and injuries would have been relieved and reduced to some extent, and that an ordinarily prudent person, situated as he was situated at the time, would have submitted to said operation, then the jury, in passing upon the issue of damages, will only award the plaintiff such an amount as they shall find he would have sustained in his improved condition, brought about by said operation. In other words, gentlemen, it was the duty of the plaintiff to exercise reasonable care to relieve himself of his injuries and to reduce the amount of damages sustained in consequence of the injuries; and if you find from the evidence that it was his duty to submit to the operation, and this would have relieved him, in whole or in part, then he would not be entitled to recover damages for that part which would have been relieved by this operation.

12. That in passing upon the issues in this case, you are instructed to answer them as you find the facts to be from the 123 evidence, uninfluenced by any sympathy you may have for

the plaintiff, or any prejudice you may entertain against the defendant, as it would be wrong for you to allow either sympathy for the one or prejudice against the other to influence you in any way in reaching a verdict in this case. You should try and decide this case just as though you were passing upon a controversy between two of your neighbors; and you cannot consider the evidence of the plaintiff's injuries and suffering in passing upon the issues of negligence and contributory negligence, as the degree and extent of his injuries and suffering have nothing whatever to do with the question of negligence and contributory negligence. And if, upon the whole question, you are not satisfied, by the greater weight of it, that the plaintiff was injured as the result of the negligence of the defendant, you will answer the first issue "No," as the burden is upon the plaintiff, not only to satisfy you that the defendant is guilty of negligence, but that such negligence was the direct and proximate cause of the plaintiff's injuries.

The defendant also excepts to the entire charge of his Honor, because it was too general, in that the Court did not declare and explain the law arising upon the defendant's theory of the case, supported by its evidence as bearing upon the first issue. This is the defendant's twenty-seventh exception.

Exception No. 27.

The jury responded to the issues as appears in the record. The defendant moved the Court to set aside the verdict on the third issue as being excessive, and manifestly showing that the jury, in rendering the same, could not have been governed and controlled by the testimony in the case. The motion was overruled, and the defendant excepted, which is the defendant's twenty-eighth exception.

Exception No. 28.

The defendant then made a motion for a new trial, for 124 errors to be assigned in the case on appeal. Motion overruled, and the defendant excepted, which is the defendant's twenty-ninth exception.

Exception No. 29.

There was a judgment for the plaintiff, as set out in the record, to which the defendant excepted and appealed to the Supreme Court, which is the defendant's thirtieth exception.

Exception No. 30.

Notice of appeal given in open court, and further notice waived. Appeal bond in the sum of \$50 (fifty dollars) adjudged sufficient. By consent, the appellant is allowed twenty-five days to serve case on appeal, and appellee fifteen days thereafter to serve countercase or exceptions.

Assignments of Error.

The defendant assigns the following errors, committed by the Court upon the trial of this cause:

1. That the Court erred in overruling the defendant's objection to, and in permitting the plaintiff to be asked and answer, the question as set forth in the defendant's first exception, as follows:

Q. What were your duties, Ernest, as flagman and baggage master?

By DEFENDANT'S COUNSEL:

Q. Were your duties set forth in the rules of the receivers of the defendant?

A. Yes.

Q. Did you have copy of these rules in your possession at time of injury?

A. Yes.

(The defendant's counsel then offered to furnish the witness a copy of said rules, which offer was declined.)

The defendant objects to the witness giving oral testimony as to his duties, when it appears that the same are set forth 125 in the rules of the receivers of the defendant, which rules are in court and subject to his use. Overruled. Defendant excepts.

A. To handle all baggage that was entrusted to my car, all the company's mail; to look after the comfort of the passengers on the train and prevent anyone from riding free. I was under the conductor's orders, and have to obey his orders, as he will so state, and to look after the United States mail, all that was put in my car. We were compelled to carry it to the postal car and deliver it to them.

2. That the Court erred in overruling the defendant's objection to, and in permitting the plaintiff to be asked and answer the question as set forth in the defendant's second exception, as follows:

Q. State whether or not this baggage that you speak of being often carried in the express car was known to the officers of the road, of your own knowledge.

By His HONOR: Do you know that, of your own knowledge?

A. Yes, I know it.

(Defendant objects to evidence as to what was done at any other time, and asks that the evidence be confined to what was done on the night of the injury. Objection overruled. Defendant excepts.)

A. Yes, sir; they knew it.

3. That the Court erred in overruling the objection to, and permitting the witness Gwathney to be asked and answer, the question as set forth in the defendant's third exception, as follows:

Q. What are the probable results in regard to injuries to the spinal cord?

(Defendant objects; overruled; exception.)

By HIS HONOR: Can you undertake to say that there is any definite or certain result from injury to the spinal cord?

A. Yes, sir.

(Objection; overruled; defendant excepts.)

A. Paralysis, partial or complete.

126 4. That the Court erred in overruling the objection to, and permitting the witness Gwathney to be asked and answer, the question as set forth in the defendant's fourth exception, as follows:

Q. Can you state at what time, in your opinion, operations should be performed for the relief of injuries to the spinal cord?

(Defendant objects; overruled; exception.)

A. Your Honor, the question is rather a broad one, and I will have to answer it somewhat in detail. Injuries which may cause or have caused a complete severance of the cord, in which there is a complete severance of the cord, it is useless to operate at all. Where there are pressure symptoms, and we suspect partial injury to the cord, early operation should be undertaken, before the pressure has caused a change or degeneration and the formation of scar (?) tissue in the fibers which prevent their performing their functions. We can say that where operation is undertaken at all, it should be undertaken with considerable promptitude—that is, in as short a time as the condition of the patient will permit—as soon as the first shock of the injury, and the depression which follows it, are past.

5. That the Court erred in not granting the defendant's motion to strike out the answer of witness Gwathney as not being responsive to the question propounded to him by the plaintiff's counsel, as set forth in the defendant's fifth exception, as follows:

Q. State, from your examination made of this man, what, in your opinion, is the cause of his trouble.

A. I think I can do that entirely candidly and with an open mind, and still give an opinion as though I had never seen the X-ray photograph. This man had an injury to his backbone, the spinal, bony column, which caused pressure and a severance of certain fibers in his cord, producing the condition of partial paralysis in his legs and a loss of sensation from the junction of his middle and upper third of his thigh downward, including the feet. He is incapable of walking or using his lower limbs except in a very spastic fashion—jerky—and is unable to stand unsupported.

127 6. That the Court erred in overruling the objection to, and permitting the witness Gwathney to be asked and answer the question as set forth in the defendant's sixth exception, as follows:

Q. I wish you would state, from your examination in this case, your knowledge of it, acquired from your examination of the patient,

whether or not you consider this case one of permanent injury, either with or without an operation.

(Defendant objects; overruled; defendant excepts.)

A. I do consider his injuries permanent, with or without an operation.

7. That the Court erred in not granting the defendant's motion to strike out the answer of witness Gwathney as not being responsive to the question propounded to him by the plaintiff's counsel, as set forth in the defendant's seventh exception, as follows:

Q. State, Doctor, what effect, if you know, from your examination of this patient, this injury has had upon his nerves.

A. Well, the boy has suffered very greatly, and suffering, of course, will make any individual depressed and upset and abnormal, from a general nervous point of view.

8. That the Court erred in overruling the objection to, and permitting the witness Gwathney to be asked and answer, the question as set forth in the defendant's eighth exception, as follows:

Q. I believe Mr. Cansler asked you if you advised the physician that an operation was the best thing?

(Defendant objects; overruled.)

Q. What did you state in reference to an operation?

(Defendant's objection sustained. Plaintiff excepts.)

Q. What did you advise the attending physician?

(Defendant objects.)

By HIS HONOR: If it was at the same time he was called in consultation, the witness may state what he advised the physicians.

(Defendant excepts.)

128 A. I advised an operation, with the hopes of relieving part of his condition, particularly his suffering, or part of it, stating that I did not hope for or expect a relief of the complete condition.

9. The Court erred in overruling the defendant's objection to and in permitting the witness Nail to be asked and answer, upon cross-examination, the question set forth in the defendant's ninth exception, as follows:

Q. In speaking of the comparison of the danger there, one car with the other, I ask you if, in your opinion, it was not highly probable that a man in that baggage car would have been either killed or seriously injured?

(Defendant objects; overruled; and defendant excepts.)

A. Well my opinion is that I wouldn't like to have taken chances.

10. That the Court erred in refusing to grant the defendant's motion to strike out so much of the testimony of the plaintiff as appeared between the letters (a) and (b), as set forth in the defendant's tenth exception, as follows:

(a) He said they were a short distance south of Raleigh and he thought he heard something or somebody get up on his car on the front of the train, and he didn't know what it was; then he went to the baggage car and asked Ernest Duvall. (b)

11. That the Court erred in refusing to grant the defendant's motion to strike out so much of the testimony of the plaintiff as

appeared between the letters (c) and (d), as set forth in the defendant's eleventh exception, as follows:

(c) I asked him if they drank any whiskey in that car or at any time while on duty, and he said that he had not, and neither of the other men had. He said if the railroad claimed any such defense as that there was not a word of truth in it. (d)

12. That the Court erred in refusing to grant the defendant's motion to withdraw a juror and make a mistrial for the misconduct of the plaintiff's witness Cox, as set forth in the defendant's twelfth exception, as follows:

129 Q. Then why did you go up there to try to prove that there was not any whiskey drunk?

A. Because I have been hearing for six months that you all (pointing to the counsel who was cross-examining him) were going to try to prove a whole lot of lies about our stealing and drinking whiskey there, and I wanted to prove that they were lies.

(At this point the counsel made towards the witness, and the witness rose up and was in the act of striking counsel with his stick when another counsel came between the parties and prevented his doing so.)

The defendant thereupon objected to the witness's answer and his demonstration in open court as being highly prejudicial to the rights of the defendant before the jury, and moved that a juror be withdrawn and a mistrial be ordered. The Court took the matter under advisement and stated that he would pass upon the motion the next morning.

The defendant here renews its motion, made on the previous afternoon, to withdraw a juror because of the misconduct of the witness Cox while upon the stand in charging the defendant and its counsel had been concocting lies to prejudice the witness and the plaintiff, and because of what transpired as the result of said charge. The motion was overruled, and the defendant excepted.

13. That the Court erred in overruling the defendant's objection to and in permitting the plaintiff to be asked and answer the question as set forth in the defendant's thirteenth exception, as follows:

Q. Mr. Duvall, Mr. Rowe testified yesterday in your absence, as I have it, that in a conversation between him and you and Mr. Cox that Cox said at Sanford, in the hospital, that Rowe had sent for him because he thought some one was in front end of the car, and suggested to Mr. Rowe that that would be a good proposition for you all to adopt for the reason of your being in the front car. State whether or not a conversation of that kind was had between you?

130 (Defendant objects; overruled; defendant excepts.)

A. No, sir, there was not.

14. That the Court erred in overruling the defendant's objection to and in permitting the plaintiff to be asked and answer the question as set forth in the defendant's fourteenth exception, as follows:

Q. Mr. Rowe said that in that same conversation some one or

all of you said it was unfortunate that you had taken a drink in the express car. Was anything of that kind said?

(Defendant objects; overruled; and defendant excepts.)

A. No, sir, there was not.

15. That the Court erred in overruling the defendant's objection to and in permitting the plaintiff to be asked and answer the question as set forth in the defendant's fifteenth exception, as follows:

Q. Mr. Rowe states in his testimony, in your absence, that you came into the car shortly after you left Raleigh and was helping him in the express car there, and that you had been in there for some time before the wreck, and that he had invited you in the car at Johnston Street Station, Raleigh. Is that true?

(Defendant objects; overruled; and defendant excepts.)

A. No, sir; that is not exactly the way it happened.

16. That the Court erred in refusing to give the defendant's first prayer for instruction, as set forth in its sixteenth exception.

17. That the Court erred in refusing to give the defendant's second prayer for instructions, as set forth in its seventeenth exception.

18. That the Court erred in refusing to give the defendant's third prayer for instruction, as set forth in its eighteenth exception.

19. That the Court erred in refusing to give the defendant's fourth prayer for instruction, as set forth in its nineteenth exception.

20. That the Court erred in refusing to give the defendant's fifth prayer for instruction, as set forth in its twentieth exception.

131 21. That the Court erred in refusing to give the defendant's sixth prayer for instruction, as set forth in its twenty-first exception.

22. That the Court erred in refusing to give the defendant's seventh prayer for instruction, as set forth in its twenty-second exception.

23. That the Court erred in refusing to give the defendant's eighth prayer for instruction, as set forth in its twenty-third exception.

24. That the Court erred in refusing to give the defendant's ninth prayer for instruction, as set forth in its twenty-fourth exception.

25. That the Court erred in charging the jury as appears between the letters (a) and (b), as set forth in the defendant's twenty-fifth exception, as follows:

(a) If you find from the evidence and the greater weight thereof, the burden being on the plaintiff, that the plaintiff's injury was caused by the defendant's negligence, proximately caused, you should answer the first issue "Yes." If you do not so find you should answer it "No." (b)

26. That the Court erred in charging the jury as appears between the letters (c) and (d), as set forth in the defendant's twenty-sixth exception, as follows:

(c) If you find from the evidence that the plaintiff had no right to go into the express car, that he was not where he should have

been, and you further find that he would not have been injured but for his going into the express car, and that his going into the express car was such an act on his part that a reasonably prudent man ordinarily would not have done under the circumstances of the situation, then he would be guilty of contributory negligence, and it would be your duty to answer the second issue "Yes." If you do not so find it would be your duty to answer the second issue "No." (d)

27. That the Court erred in its entire charge to the jury, because it was too general, in that the Court did not declare and explain the law arising upon the defendant's theory of the case supported by its evidence, as bearing upon the first issue, as set forth in the defendant's twenty-seventh exception.

28. That the Court erred in refusing to set the verdict aside on the third issue, because the same was manifestly excessive and because the jury could not have been governed and controlled by the testimony in the case as bearing upon said issue, as set forth in the defendant's twenty-eighth exception.

29. That the Court erred in overruling the defendant's motion for a new trial for errors set out in the case on appeal, as set forth in the defendant's twenty-ninth exception.

30. That the Court erred in granting the judgment for the plaintiff as appears in the record, as set forth in the defendant's thirtieth exception.

WADESBORO, N. C., March 8, 1910.

The appellant and the appellee having disagreed on statement of case on appeal, after one notice to counsel of both sides, at Wadesboro, N. C., on 8th March, 1910, both parties being represented by counsel, I settled the foregoing as the case on appeal, and the clerk will certify the foregoing to the Supreme Court.

C. C. LYON, Judge.

And thereafter, on the 16th day of February, 1910, the defendant Seaboard Air Line Railway filed its undertaking on appeal to the Supreme Court, which was approved by the clerk, said undertaking being in words and figures following:

Appeal Bond for Costs.

NORTH CAROLINA,
Moore County:

In the Superior Court.

(Title of Cause.)

Whereas, on or about the 29th day of January, 1910, E. N. Duvall, the plaintiff, recovered judgment against Seaboard Air Line Railway, defendant, in the Superior Court of said county in the sum of (\$30,000) thirty thousand dollars and for costs of suit;

And whereas, the appellant intends to appeal from said judgment to the Supreme Court:

133 Now, therefore, we, Seaboard Air Line Railway, of the county of ——, and L. A. Monroe, of Scotland County, North Carolina, undertake, pursuant to the statute, that the said appellant will pay all costs which may be awarded against said appellant on such appeal, not exceeding the sum of fifty dollars (\$50).

This the 14th day of February, 1910.

S. A. L. RAILWAY,
By W. H. NEAL, *Att'y.* [SEAL.]
L. A. MONROE. [SEAL.]

L. A. Monroe, the surety above named, being duly and severally sworn, says that he is a resident and freeholder in the State of North Carolina, and worth double the sum specified in the above undertaking; over and above all his debts and liabilities and exclusive of property exempt from execution.

Sworn and subscribed to before me, this the 14th day of February, 1910.

[NOTARIAL SEAL.]

THOS. J. GILL,
Notary Public.

The foregoing bond is approved.
February 16, 1910.

J. ALTON McIVER,
C. S. C. Moore County.

Clerk's Certificate.

NORTH CAROLINA,
Moore County:

I, J. Alton McIver, clerk of the Superior Court of Moore County, State of North Carolina, do hereby certify that the foregoing is a full, true and perfect transcript of the record in a civil action pending in said court wherein E. N. Duvall is plaintiff and S. Davies Warfield, R. Lancaster Williams and E. C. Duncan, receivers Seaboard Air Line Railway, and Seaboard Air Line Railway are defendants.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Carthage, on this 18 day of March, 1910.

J. ALTON McIVER,
C. S. C. Moore County.

(Docket entries; Appeal docketed March 19, 1910; Argued March 31; opinion handed down May 4.)

134 H. F. Seawell and Douglass & Lyon for plaintiff;
Walter H. Neal, U. L. Spence and Burwell & Cansler for defendant.

CLARK, C. J.:

The plaintiff was baggage master and flagman on the defendant's road. This action was brought for personal injuries sustained by him in a head-on collision near Sanford on a thru train, going South. The exceptions are numerous but the real points in the controversy lie within a small compass. The defendant contends that under the Federal Employers' Liability Act the plaintiff is not entitled to recover for three reasons: 1. That at the time of the injury the plaintiff was not an employee of the defendant. 2. That he was not injured while in interstate commerce. 3. That he was not injured as the result of the defendant's negligence.

The uncontested facts are that the plaintiff was baggage master and flagman and was so employed at the time of the injury; he carried local baggage in the baggage car and thru baggage in the express car; at the time of the accident the train was nearing Sanford going south at which point this thru train stopped and where thru baggage might be taken on, the plaintiff stepped from the baggage car into the express car and soon thereafter the collision occurred in which he was seriously injured. The defendant contends that by going from the baggage car to the express car the plaintiff ceased to be an employee and was not engaged in the scope of his employment. But the fact is that his duties called him to the express car as well as to the baggage car and even if it had not, the fact that the baggage man stepped into the adjoining express car for a moment would not have terminated his employment or put him out of the scope of his duties. There is no evidence that being in the express car in any wise enhanced his risk or contributed to his injuries. In fact the probabilities are that had he remained in the baggage car he would have been more seriously injured or possibly killed by the trunks falling upon him. The

evidence is that the baggage car was more seriously damaged
135 than the express car. The plaintiff's going into the express car was not an unlawful act and under the circumstances could not have affected his employment or the responsibility of the company. Besides his duty lay in the express car as well as in the baggage car, for in the former the thru baggage, which was part of his charge, was carried and though there was none at that time he might prepare to receive such at Sanford. As to negligence, the head-on collision raised a presumption of negligence *Marcom v. R. R.* 126 N. C. 200 and Cited Cases in the Annotated Ed. and the issue of the negligence was found by the jury.

After full consideration of all the exceptions we have been unable to find any error prejudicial to the defendant.

No Error.

136

(Title of Cause.)

Judgment.

This cause came on to be argued upon the transcript of the record from the Superior Court of Moore County:—upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here, that the opinion of the Court, as delivered by the Honorable Walter Clark, Chief Justice, be certified to the said Superior Court, to the intent that the judgment be affirmed. And it is considered and adjudged further, that the defendant and surety do pay the costs of the appeal in this Court incurred, to-wit, the sum of eighteen 35/100 dollars (\$18.35), and execution issue therefor.

137 In the Supreme Court of North Carolina.

No. 288.

E. N. DUVALL, Plaintiff,
v.
SEABOARD AIR LINE RAILWAY, Defendant.

Petition for Writ of Error.

Epitome of the Record.

To the Honorable Walter Clark, Chief Justice of the Supreme Court of North Carolina:

Your petitioner, the Seaboard Air Line Railway, a railroad corporation, organized under the laws of the States of Virginia and North Carolina, respectfully shows:

That heretofore, to-wit, on the 28th day of August, 1909, there was instituted in the Superior Court for the County of Moore, in the State of North Carolina, a civil action, in which E. N. Duvall was plaintiff, and S. Davies Warfield, R. Lancaster Williams and E. C. Duncan, Receivers of your petitioner, were defendants, to recover, under the Federal Employers' Liability Act, damages which the plaintiff claimed to have sustained while employed in Interstate Commerce.

The complaint filed in said cause prayed for the recovery of \$75,000 damages for personal injuries alleged to have been suffered by the plaintiff, as the result of a collision of a freight train 138 with a through passenger train, running from Portsmouth,

Va. to Monroe, N. C., upon which train the plaintiff was employed to discharge the duties of a baggage master and flagman, and, it was alleged was actually engaged in discharging said duties at the time of the collision; to which complaint the Receivers filed their answer, admitting certain allegations and denying others.

At the January term, 1910, of the Superior Court for the County of Moore, the said Receivers filed their petition or plea in abatement, setting forth, in substance, that since the institution of said action, and filing the answer therein, said Receivers had, pursuant to the decree of the Circuit Court of the United States for the Fourth Circuit, transferred and delivered into the possession of said Railway all of the property and effects which came into their hands as Receivers, and had been by a decree of said Court discharged and relieved from all of the duties of said Receivership, and prayed that the said action might abate or be dismissed as to them. Upon filing said petition or plea the Court ordered that the said action, as to the said Receivers, abate or be dismissed, and upon motion of the plaintiff's counsel it was further ordered that your petitioner, the Seaboard Air Line Railway, be made party defendant in said action, and directed that process issue to it to appear and plead to the complaint theretofore filed in said cause, in such manner as it might be advised, and thereupon your petitioner, the Seaboard Air Line Railway, entered its voluntary appearance as defendant in said action, expressly waiving its right to be brought in by process of the Court, and agreed that the said cause should stand for trial, and be tried at the term of the Court then sitting, on condition that it be permitted to file an unverified answer therein.

The answer so filed by your petitioner expressly denied so much of the paragraph *two* of the complaint as alleged, "either directly or indirectly that the plaintiff was, at the time of his alleged injuries, in the employment of the then Receivers of this defendant, as baggage master and flagman, and in the discharge of his duties as such upon said train." In denying paragraph *three* it admitted that a freight train, operated by the *the* employés of said Receivers, met in a head-on collision with the passenger train on its track, in the express car of which the plaintiff was riding, by permission of the express messenger, which collision caused the derailment of said express car, thereby wounding and injuring the plaintiff to some extent, and that the collision of said trains was due to the carelessness of some of the agents or employés of said Receivers. The answer set up the further defense that the plaintiff caused his own injuries in that he, in direct violation of the rules of said Receivers, then in force, and known to him, left the baggage car in said passenger train where it was his duty to be, and went into the express car of said train, which was in the possession and under the control of the agent of the Southern Express Company, either for the purpose of assisting said express agent in the discharge of his duties, or for some other purpose in no wise connected with the duties of the plaintiff's employment, and while in said express car was injured by the derailment thereof, as the result of the collision of said passenger and freight train.

The cause, coming on to be heard at said January Term, 1910, of the Superior Court for the said County of Moore, before his Honor, C. C. Lyon, the Judge holding the Courts of the District in which said County is located, and a jury having been empaneled

therein, the plaintiff, in order to maintain the issues on his part, introduced, among other evidence, the following:

140 Ernest N. Duvall (Tr. p. 18) testified that he was employed as baggage master and flagman for the Receivers of the Seaboard Air Line Railway, and that his duties were to handle baggage that was entrusted to his care; to look after the comfort of the passengers on the train and prevent any one from riding free; to obey the conductor's orders and look after all the United States mail that was put in his care; that the postal car was first in the train, next to the engine, and the baggage car was third, and he had to go through the express car to get from the baggage car to the postal car; that there was a partition in the baggage car and that he carried his baggage at the head end of the car. (Tr. p. 19.) Did not carry all his baggage at all times in the baggage car. Sometimes used express car for that purpose. In fact, until recently, had had no baggage car and had to use express car as baggage car. Left Portsmouth, Va., on the 12th of March, 1908, at nine o'clock, on passenger train No. 33, as baggage master on his run to Monroe, N. C. Baggage car was used as combination car. Postal car was cut off at Norlina, and that left the baggage or combination car, first-class car and sleeper. Baggage was carried in the front half of combination car, the rear being for colored passengers, and the one back of that was the sleeper. Conductor W. T. Coxe was in charge of the train. The wreck occurred about 4:40 the next morning. The officers of the Receivers knew that carried baggage in the express car. Did not remember whether had any baggage in express car the night of the collision or not. Always used the express car for through baggage, to save transferring it at Hamlet. Directed to do so by those in charge. Mr. Rowe was the express messenger in charge of the express car. (Tr. p. 20.) Some time after leaving Raleigh, did not remember how many stations had passed, nor how long before wreck—think something like 20 or 30 minutes—Rowe,

the express messenger, asked plaintiff where the conductor 141 was. Upon being told that he was collecting tickets, Rowe said, "Tell him to come up in my car," and witness said, "All right. When he comes up, I will." When the conductor came to baggage car witness gave him Rowe's message, and he said, "All right. Let's go and see what he wants," and put his tickets in pigeon-hole and went out. Witness stopped to lock the door, as he always did when leaving the car, then picked up lantern and followed conductor into express car, when the collision almost immediately occurred, throwing plaintiff on his head, with his feet bent back, and the express packages, consisting of tubs of oysters, boxes of fish, and any amount of whisky in jugs and crates, and a whole lot of other heavy stuff, piled on top of him.

(Tr. p. 23) Upon cross-examination the witness stated that had something like 15 or 18 pieces of baggage in the car at the time of the wreck. (Tr. p. 24.) As to its location, he remembered that he had a big trunk sitting in the door, which was to come off at Sanford, and that he had two heavy shoe-trunks on the other side. He stacked the baggage, what is known as "through stuff," so he

would not have to handle it any more. That was stacked on either side of the door, to leave an aisle through. The baggage was stacked in the end of the car next to the express car. The side-doors were about the middle of the car, and about 6 or 7 feet from the partition, between the baggage and the colored passenger compartment. Had no baggage stacked between the side doors and the partition. There was a stove on one side, and two boxes, known as the "train box," and the "conductor's box," on the other, which were underneath the pigeon-holes which he used as a desk. Between the side-doors and the passenger compartment of the car not occupied by the boxes and the stove, there was a bag of mail, the plaintiff's coat, hat and grip. (Tr. p. 25.) All the space from the side doors to the

front end of the car was occupied by baggage, except the
142 aisle leading to the front door, which was used for the purpose of going back and forth between the cars. (Tr. p. 26.)

It was some time after leaving Raleigh that express messenger asked witness to speak to the conductor for him. He came into the baggage car after the train had passed a station or two, and asked witness where the conductor was. Witness had a book of rules of the Receivers in his possession, which correctly set forth what his duties were. These rules appeared on page 80 of the book of rules identified by witness.

Plaintiff also introduced W. T. Coxe (Tr. p. 28), who testified, among other things, that he was conductor in charge of the train in question, and that plaintiff was baggage master (Tr. p. 39), and also flagman or brakeman—anything the conductor wanted him to do. That just before wreck witness went up to the front end of the train and into the baggage car, where he did a great deal of his own work, when the plaintiff said to him, "The express messenger wants to see you in his car." Witness said, "Well, come on; go with me and see what he wants." The express messenger was Mr. Wm. Rowe. Witness got about midway of the car and had just sat down, when the collision occurred. Plaintiff was coming on behind him.

On cross-examination the witness said (Tr. p. 43) "Would say the baggage car would hold about 48 trunks. There was the average run of baggage in the car that night. Used to use one end of the express car for baggage. That was when did not have any baggage car. It was nothing unusual to carry baggage in the express car. Could not say whether there was any in there that night or not."

The defendant, in order to maintain the issues on its part
143 introduced, among other evidence, the following:

W. P. Rowe (Tr. p. 47) was express messenger on the wrecked passenger train. His duties as such messenger were handling express, putting off, recording and delivering packages. He had charge of the car he was in while en route. There (Tr. p. 48) was no baggage in the express car the night of the wreck. The plaintiff came into the express car three or four minutes after leaving Raleigh, and was there when the wreck occurred. He was assisting the witness in checking the freight or express packages. The reason he came was he and the witness had a conversation when the train was standing at the Raleigh station. Witness was standing in ex-

press car door, when plaintiff was asked how he was getting along with his work. Upon being told that witness had a heavy run, and was not yet through work, and being asked if he would come in and help witness, as soon as the train left Raleigh, plaintiff agreed to do so, and did come in. It wasn't long before the wreck that Conductor Coxe came into the car,—probably about ten minutes—and he remained there until the wreck occurred. Witness did not send for him that night. Did not tell plaintiff to tell him to come in there. After Conductor Coxe and plaintiff came in,—the latter was helping witness for a short while, four or five minutes, after the conductor came in—they all three took a drink of whisky. At the exact time of the wreck witness was recording way-bills, and plaintiff was standing or sitting on the lefthand side of the car, doing nothing. Had a pretty good run of express that night, consisting of fish, oysters, and a number of packages of whisky. The fish were in barrels and boxes and the oysters in tubs and boxes; the whisky was put up in jugs, boxes and also crated. Had about 25 tubs of oysters, and probably 20 boxes of fish, and about 100 or more crates of whisky. The

heaviest crated boxes would weigh about 100 pounds, the
144 lightest from 18 to 34 pounds. The other (Tr. p. 49) express consisted of general merchandise. Put different packages of express in one pile for the different routes and stations, so there were several piles.

On cross-examination witness said: (Tr. p. 52), Yes, very often had baggage in the express car. It is understood when the baggage man is coming into the express car. He don't have to have a ticket to come in. The doors were right together. They would let the witness know so he would open the doors for them to come in. No strange thing for the crew to come into the express car.

On re-direct examination the witness said: (Tr. p. 54) Ordinarily witness kept door to express car shut. Supposed to keep them locked and barred. If baggage master wanted to get into express car, he would have to notify witness, who would open the door for him. Baggage master's duties called him into the express car when the baggage was stored in there, or when he had to go through, to go to the head of the train.

Defendant also introduced the rules of the Receivers which had been previously identified by the plaintiff when upon the stand, one of which reads as follows: (Tr. p. 67) "No. 664. They (baggage masters) must report for duty at the appointed time; remain in baggage car while on duty, except when required to take the place of the brakeman; be civil and obliging to passengers, and not permit any one to ride in the baggage car except those whose duties required it."

Defendant also introduced Capt. Wrenn, (Tr. p. 65) who testified that he had been passenger conductor on passenger train running from Portsmouth to Monroe, for a number of years, and that the custom had been, when there was baggage in the express car, the
145 baggage master had the right to go in there to check up and look after it, just as — it were in the baggage car. When there was no baggage in the express car he had no right in there

then, though baggage masters evidently went in there sometimes, but the custom was not to go. They had never attempted to put baggage in the express car when there was room for it in the baggage car.

Defendant also introduced G. F. Bronson (Tr. p. 67) who testified that he had been for some time prior to the collision in question, route agent for the Southern Express Company. That it was against the rules of that Company to allow anybody outside of the officials of that Company into the express car, except in case of an overflow. That when there was a baggage car the baggage was to be carried there. When there was no baggage car on the train, it was carried in the express car. Had never known of the rules of the Company being violated in this particular.

The defendant also introduced N. W. Kelley, (Tr. p. 55); O. P. Makepeace, (Tr. p. 57); E. D. Nall, (Tr. p. 58); S. C. Moffatt, (Tr. p. 60); T. A. Yarborough, (Tr. p. 60); O. M. Yarborough, (Tr. p. 61), and Thomas Gross, (Tr. p. 62), all of whom testified in substance that they lived near Sanford, and visited the scene of the wreck almost immediately after it occurred. That the express car had been telescoped by the baggage car, and had been almost completely demolished by it. That while the baggage car had been turned over on its side down the embankment, it had practically remained intact, only the front end having been battered or broken in. That the baggage in the baggage car was taken out very little injured, and that the passenger end of the car was intact, with the exception that some of the cushions or seats had been disarranged and the screws had been knocked down. That there were five colored passengers in this car, all of whom had gotten out with slight injuries.

146 At the close of all the testimony the defendant, your petitioner, in apt time prayed the Court, in writing, to instruct the jury as follows:

1. That where an employé undertakes to do something not his duty to do, the master is not negligent; and if the jury shall find by the greater weight of the evidence that the plaintiff was acting outside of the scope of his employment when he was injured, they will answer the first issue "No."

His Honor refused to give this instruction and the defendant excepted, which was the defendant's sixteenth exception.

3. That as the plaintiff admits he was in the express car at the time of his injuries, and as the rules of the receivers of the defendant (of which he admits he had notice) required him to remain in the baggage car when not engaged in flagging the train, the burden is upon the plaintiff, to satisfy the jury by the greater weight of the evidence, that when he went into said express car, and was injured, he was engaged in the discharge of the duties of his employment, and if he has failed to so satisfy the jury, you will answer the first issue "No."

His Honor refused to give this instruction and the defendant excepted, which was the defendant's eighteenth exception.

5. Although the jury shall find that the plaintiff, in fact, went

into the express car at the request of the conductor, yet unless they shall further find by the greater weight of the evidence that he went because he thought it was his duty to go in obedience to the conductor's orders and not because he was being invited to go to gratify his idle curiosity, the jury will answer the first issue "No."

His Honor refused to give this instruction, and the defendant excepted, which was the defendant's twentieth exception.

147 6. The admitted rules of the receivers of the defendant required the plaintiff to remain in the baggage car when not engaged in flagging the train, and the plaintiff had no right to go into the express car in violation of the provisions of the said rules, unless the conductor ordered him to do so for the purpose of discharging some one of the duties of his employment; and unless the jury shall find by the greater weight of the evidence that when the conductor told the plaintiff to go with him into said car, he thereby understood that the conductor wished him to go to discharge his duties as an employé of the defendant, the jury will answer the first issue "No."

His Honor refused to give this instruction and the defendant excepted, which was the twenty-first exception.

Thereupon the Court instructed the jury, of its own motion, as follows:

"There are three issues submitted to you, gentlemen. They are as follows:

1. Was the plaintiff injured by the negligence of the defendant?

Now, the burden of that issue is on the plaintiff, and the plaintiff must satisfy you by the evidence, and the greater weight thereof, that he was injured by the negligence of the defendant, and that the defendant's negligence was the proximate cause of the injury. Gentlemen of the jury, in passing on that issue, as I said, defendant admits its negligence, but denies that its negligence was the proximate cause of the plaintiff's injury, and contends that the proximate cause of the injury was his going into the express car, and not the negligence of the defendant. (a). If you find from the evidence, and the greater weight thereof, the burden being on the

plaintiff, that the plaintiff's injury was caused by the defendant's negligence, proximately caused, you should answer the first issue "Yes." If you do not so find, you should answer it "No." (b)

To that part of the charge which is embraced between the letters (a) and (b) the defendant excepted, which was the defendant's twenty-fifth exception.

"2. Was the plaintiff's injury caused by his contributory negligence?

Contributory negligence is such an act or omission on the part of the plaintiff amounting to a want of ordinary care, as, concurring and co-operating with some negligent act or omission of the defendant, makes the act or omission of the plaintiff the proximate cause or occasion of the injury complained of. Proximate cause means direct cause, that cause which produces the result without any other supervening cause bringing about the injury.

(c) If you find from the evidence that the plaintiff had no right to go into the express car, that he was not where he should have been, and you further find that he would not have been injured but for his going into the express car, and that his going into the express car was such an act on his part that a reasonably prudent man ordinarily would not have done under the circumstances of the situation, then he would be guilty of contributory negligence, and it would be your duty to answer the second issue "Yes." If you do not so find, it would be your duty to answer the second issue "No" (d).

To that part of the charge which is embraced between the letters (c) and (d), the defendant excepted, which was the defendant's twenty-sixth exception." * * *

"If you answer the second issue 'Yes,' then on the question of damages, the Court charges you that, in an action like the one being tried, if the jury shall find from the evidence that the plaintiff, an employé of the defendant Company, was guilty of contribu-
149 tory negligence, that is that he contributed to his own injury, such negligence would not bar a recovery if the defendant was guilty of negligence also, but the damages which the jury shall, under the evidence assess to the plaintiff, shall be diminished in proportion to the amount of negligence attributable to the plaintiff."

At the conclusion of said trial the jury returned a verdict for the plaintiff and assessed his damages at thirty thousand dollars, and the defendant then made a motion for a new trial for errors to be, and which were, assigned in the case on appeal, which motion was overruled and the defendant excepted, which was the defendant's twenty-ninth exception; there was a judgment according to the verdict, to which the defendant excepted and appealed to the Supreme Court—which was the defendant's thirtieth exception—and assigned the following, among others, as errors:

16. That the Court erred in refusing to give the defendant's first prayer for instruction, as set forth in the defendant's sixteenth exception.

18. That the Court erred in refusing to give the defendant's third prayer for instruction, as set forth in its eighteenth exception.

20. That the Court erred in refusing to give the defendant's fifth prayer for instruction, as set forth in the defendant's twentieth exception.

21. That the Court erred in refusing to give the defendant's sixth prayer for instruction, as set forth in the defendant's twenty-first exception.

25. That the Court erred in charging the jury as appeared between the letters (a) and (b), as set forth in the defendant's twenty-fifth exception.

150 26. That the Court erred in charging the jury as appeared between the letters (c) and (d), as set forth in the defendant's twenty-sixth exception.

Federal Questions Presented.

Your petitioner further shews that on the fourth day of May, 1910, the Supreme Court of North Carolina, which is the highest Court in that State in which a decision in the action herein referred to could be had, upon considering and passing upon said appeal, rendered a final judgment against your petitioner in said action, in all respects affirming the judgment of the trial Court, and upholding its various rulings and decisions made upon the trial of said cause, which were upon said trial duly excepted to by your petitioner, and brought before said Supreme Court for review, and there urged as grounds for a new trial, as above set forth; and your petitioner specifically shows that said decisions of said Courts, and each of them, denied to your petitioner a right, privilege or immunity held by your petitioner under the Constitution and statutes of the United States in that,—

First. The complaint having specifically charged that the plaintiff, when injured, was engaged in discharging the duties of a baggage master upon a through passenger train running from Portsmouth, Va. to Monroe, N. C., necessarily alleged facts which brought the plaintiff's cause of action within the provisions of the Federal Employers' Liability Act of 1908, which Act, by its terms, is exclusively applicable to those employés of interstate carriers who are injured while actually engaged in interstate commerce, while the instructions erroneously given by the trial Court upon its own motion, and approved by the Supreme Court, as hereinbefore set out, totally ignored the provisions of said Act of Congress, limiting rights of

action to railway employés injured while actually engaged
151 in interstate commerce, but on the contrary, made the plain-

tiff's right to recover depend solely upon the question of negligence and contributory negligence at common law, without reference to the restrictions and limitations of said Act, notwithstanding the defendant offered evidence upon the trial of said cause, tending to prove that at the time of said injury the plaintiff had abandoned his post of duty in the baggage car, had, in violation of the rules of the Company, gone into the express car, where he was assisting the express messenger in the discharge of his duties, and was consequently not engaged in interstate commerce when injured.

Second. That notwithstanding the complaint alleged facts which brought the plaintiff's cause of action exclusively within the provisions of said Federal Employers' Liability Act, and that the case was tried upon said Act, yet the Court erroneously refused to give to the jury the special written instructions asked by the defendant, as hereinbefore set out, which, in substance, embraced the defendant's theory of the case, that upon a proper interpretation of said Act, the plaintiff could not recover if the jury should find the facts as testified to by the defendant's witnesses, that the plaintiff, at the time of his injury, had abandoned his post of duty, and in violation of the rules of the Company, had gone into the express car to assist the express messenger in the discharge of his duties, as in that event

he would not have been injured while employed in interstate commerce, within the meaning of said Act.

Third. Your petitioner further shows that a Federal question was made in said case, which involved the construction of the Federal Employers' Liability Act of 1908, and that by reason of the erroneous construction put by the Court upon said Act, a right, privilege or immunity claimed by your petitioner was denied it, as hereinbefore set out, and that the final judgment of the 152 Supreme Court was repugnant to and in conflict with the laws of the United States as aforesaid, and that said judgment of said Court was contrary thereto, and that a decision of said Federal question was necessary to the judgment rendered:

Wherefore, inasmuch as your petitioner feels aggrieved by the final decision of the Supreme Court of North Carolina, in rendering a judgment against it in this action, it respectfully prays that a Writ of Error may issue from the Supreme Court of the United States to the Supreme Court of North Carolina, for the correcting of the errors complained of; that an order may be entered fixing the amount of the supersedeas bond herein; that a duly authenticated transcript of the record and proceedings thereof in said Supreme Court of North Carolina may be sent to the Supreme Court of the United States, and that the decision and judgment of the Supreme Court of North Carolina herein, may be reversed and annulled.

SEABOARD AIR LINE RAILWAY,
By WALTER H. NEAL,
BENJAMIN MICOU,
Attorneys.

STATE OF NORTH CAROLINA,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by the Seaboard Air Line Railway to Ernest N. Duvall, in the sum of Forty Thousand Dollars; such bond when approved to act as a supersedeas.

Dated May 12th, 1910.

WALTER CLARK,
Chief Justice Supreme Court of N. C.

153 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of North Carolina,
Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Ernest N. Duvall, plaintiff, and the Seaboard Air Line Railway, a corporation, defendant, wherein was drawn in question a right, privilege or immunity claimed by the Seaboard Air Line Railway,

defendant, under a statute of the United States, and the decision was against such right, privilege or immunity, so claimed and specially set up by said defendant; a manifest error hath happened, to the great damage of the said Seaboard Air Line Railway, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

154 Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 12th day of May, in the year of our Lord one thousand nine hundred and ten.

[Seal United States Circuit Court, Eastern Dist. of N. C.]

H. L. GRANT,
*Clerk Circuit Court United States,
Eastern District of North Carolina.*

Allowed.

WALTER CLARK,
*Chief Justice Supreme Court
of North Carolina.*

155 THE UNITED STATES OF AMERICA, *ss.*:

The President of the United States to Ernest N. Duvall, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of North Carolina, wherein the Seaboard Air Line Railway is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of North Carolina, this the 12 day of May, 1910.

WALTER CLARK,
Chief Justice Supreme Court of North Carolina.

Attest:

[Seal of the Supreme Court of the State of North Carolina.]

THOS. S. KENAN,
Clerk Supreme Court of North Carolina.

156 UNITED STATES OF AMERICA,

Fourth Circuit, Eastern District of North Carolina:

I Claudius Dockery, United States Marshal for the Eastern district of North Carolina in the Fourth Circuit and County of Wake do hereby certify that I served the foregoing citation upon W. C. Douglass attorney of record for Ernest N. Duvall the defendant in error in case of Seaboard Air Line Railway plaintiff in error against Ernest N. Duvall, defendant in error, by reading to said Douglass in person, and by giving to him in person, a true and certified copy of said citation with all endorsements thereon at Raleigh N. C. in his office on the 16th day of May 1910, at 1:30 o'clock. Witness my hand.

CLAUDIUS DOCKERY.

United States Marshal.

157

In the Supreme Court of North Carolina.

No. 288.

E. N. DUVALL, Plaintiff,

v.

SEABOARD AIR LINE RAILWAY, Defendant.

Assignments of Error and Prayers for Reversal.

This was an action instituted by the plaintiff, E. N. Duvall, upon the Federal Employers' Liability Act, passed by the Congress of the United States, and approved on the 22nd day of April, 1908, to recover for personal injuries sustained by him, while he alleges he was discharging the duty of a baggage master on one of the defendant's passenger trains then engaged in interstate commerce between Portsmouth, Va., and Monroe, N. C.

See, 1 of the Statute upon which the action was brought, provides:

"That every common carrier by railroad, while engaged in commerce between any of the States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * resulting in whole or in part from the negligence of any of the officers, agents or employés of such carrier."

The plaintiff, in order to maintain the issues on his part, offered evidence tending to prove that just prior to the injury complained of, he had gone, at the request of, and with the conductor, from the baggage car into the express car, to see what the express messenger wanted with the said conductor, and that almost immediately after going into the said express car the collision in which he was injured, occurred.

158 The defendant, in order to maintain the issues on its part, and to establish its defense that the plaintiff was not injured while employed in interstate commerce by it, and consequently

was not entitled to recover upon the Statute, offered evidence tending to prove that some time prior to said collision the plaintiff had left the baggage car, in direct violation of the rules of the Company, and had gone into the express car to assist the express messenger discharge his duties, and was so engaged when the collision occurred.

Defendant also submitted, in apt time, and in writing, certain prayers for instruction, hereinafter set forth, embodying the foregoing contention, that upon its theory of the testimony and the law, the plaintiff could not recover upon the Statute, because he was not injured while employed by the defendant in interstate commerce, as the result of its negligence, all of which instructions were refused by the Court, who, upon its own motion, charged the jury so as to make the plaintiff's right to recover depend solely upon the questions of negligence and contributory negligence, without reference to the restrictions and limitations in said Statute contained, so that the defendant was totally deprived upon said trial, of its said defense.

The Seaboard Air Line Railway, defendant in the Court below, and plaintiff in error in the Supreme Court of the United States, therefore respectfully assigns as error in the record and proceedings in this cause, in the Supreme Court of North Carolina, the following:

First. That the Supreme Court of North Carolina erred in upholding the action of the trial Court in its refusal to give instruction number one, asked by the defendant, the Seaboard Air Line Railway, as follows:

"1. That where an employé undertakes to do something not his duty to do, the master is not negligent; and if the jury shall find by the greater weight of the evidence that the plaintiff was acting outside the scope of his employment when he was injured, 159 they will answer the first issue 'No.'"

Second. That said Court erred in upholding the action of the trial Court in its refusal to give instruction number three, asked by said defendant, as follows:

"3. That as the plaintiff admits he was in the express car at the time of his injuries, and as the rules of the receivers of the defendant (of which he admits he had notice) required him to remain in the baggage car when not engaged in flagging the train, the burden is upon the plaintiff to satisfy the jury by the greater weight of evidence, that when he went into said express car, and was injured, he was engaged in the discharge of the duties of his employment, and if he has failed to so satisfy the jury, you will answer the first issue 'No.'"

Third. That said Court erred in upholding the action of the trial Court in its refusal to give instruction number five, asked by said defendant, as follows:

"5. Although the jury shall find that the plaintiff, in fact, went into the express car at the request of the conductor, yet unless they shall further find by the greater weight of the evidence that he went because he thought it was his duty to go in obedience to the conductor's orders and not because he was being invited to go to gratify his idle curiosity, the jury will answer the first issue 'No.'"

Fourth. That said Court erred in upholding the action of the trial Court in its refusal to give instruction number six, asked by said defendant, as follows:

"6. The admitted rules of the receivers of the defendant required the plaintiff to remain in the baggage car when not engaged in flagging the train, and the plaintiff had no right to go into the express car in violation of the provisions of the said rules, unless the conductor ordered him to do so for the purpose of discharging some one of the duties of his employment; and unless the jury shall find by the greater weight of the evidence that when the conductor told the plaintiff to go with him into said car, he thereby understood that the conductor wished him to go to discharge his duties as an employé of the defendant, the jury will answer the first issue 'No.'"

Fifth. That said Court erred in upholding the instructions given the jury by the trial Court, upon its own motion, as being correct, and as presenting a proper construction of the Federal Employers' Liability Act of 1908, which instruction was duly excepted to by said defendant, and was as follows:

(a) "If you find from the evidence, and the greater weight thereof, the burden being on the plaintiff, that the plaintiff's injury was caused by the defendant's negligence, proximately caused, you should answer the first issue 'Yes.' If you do not so find, you should answer it 'No.'" (b)

Sixth. That said Court erred in upholding the instructions given the jury by the trial Court, upon its own motion, as being correct, and as presenting a proper construction of the Federal Employers' Liability Act of 1908, which instruction was duly excepted to by said defendant, and was as follows:

(c) "If you find from the evidence that the plaintiff had no right to go into the express car, that he was not where he should have been, and you further find that he would not have been injured but for his going into the express car, and that his going into the express car was such an act on his part that a reasonably prudent man ordinarily would not have done under the circumstances of the situation, then he would be guilty of contributory negligence, and it would be your duty to answer the second issue 'Yes.' If you do 161 not so find, it would be your duty to answer the second issue 'No.'" (d)

Seventh. That said Court erred in holding that "the uncontested facts are that the plaintiff was baggage master and flagman and was so employed at the time of the injury;" inasmuch as the defendant offered evidence which conclusively showed that the plaintiff was not so employed at the time of the injury, but on the contrary, had abandoned his post of duty in the baggage car, and in violation of the rules of the Company had gone into the express car to assist, and was assisting, the express messenger discharge his duties.

Eighth. That said Court erred in holding that according to "the uncontested facts" the plaintiff's duties called him into the express car, as well as the baggage car, and that his going into the

express car, under the circumstances, "did not terminate his employment or put him out of the scope of his duties," inasmuch as the defendant offered evidence which conclusively showed, not only that the plaintiff had no duties to perform in the express car at the time of the injury, but on the contrary, was there in violation of the known rules of the Company, engaged in assisting the express messenger discharge his duties.

Ninth. That said Court erred in holding that "there is no evidence that being in the express car in anywise enhanced his (plaintiff's) risk or contributed to his injuries," and that, "in fact, the probabilities are that had he remained in the baggage car, he would have been more seriously injured, or possibly killed, by the trunks falling upon him;" inasmuch as the defendant offered evidence which was uncontradicted, to the effect that the express car was completely demolished, having been "telescoped" by the baggage car, and that the chances of being injured in said car were much greater than in the baggage car.

162 Tenth. That said Court erred in holding that "the evidence is that the baggage car was more seriously damaged than the express car;" inasmuch as the defendant proved by eight uncontradicted witnesses, who viewed the wreck immediately after it occurred, that the express car was completely demolished, while the baggage car, while turned over down the embankment, was practically intact, with the exception of the front end, which had telescoped the express car, and that the baggage was taken out but little damaged, and the passengers in the rear end of said car escaped practically unhurt.

Eleventh. That said Court erred in holding that "the plaintiff's going into the express car was not an unlawful act, and under the circumstances could not have affected his employment or the responsibility of the Company," inasmuch as the defendant offered evidence which conclusively showed that the rule of the Company, known to the plaintiff, required him to remain in the baggage car when not discharging the duties of a flagman or brakeman, and that he had gone into the express car, in violation of this rule, to assist the employé of another Company discharge his duties.

Twelfth. That said Court erred in holding that the plaintiff's "duty lay in the express car, as well as in the baggage car, for in the former the through baggage, which was part of his charge, was carried, and though there was none at that time (in the express car) he might prepare to receive such at Sanford;" inasmuch as the uncontroverted evidence of both parties showed that he did not go into the express car for the purpose of receiving or handling through baggage, and the defendant's evidence showed not only that the plaintiff was in said car to assist the express messenger, but also that the Railway Company had no right to carry baggage of any sort in said express car, when there was room for it in the baggage car, as was the case on the night of the collision.

163 Thirteenth. That said Court erred in denying to the defendant, the Seaboard Air Line Railway, the right, privilege or immunity of having said cause tried and determined solely upon

a proper construction of the Federal Employers' Liability Act of 1908, as claimed by said defendant, and in upholding the action of the trial Court, who, though professing to try said cause upon said Act, totally ignored its provisions, and conducted said trial as if the action had been brought at common law.

Fourteenth. That said Court therefore erred in rendering the final judgment it did render against the defendant, the Seaboard Air Line Railway, and which is complained of in this case.

Wherefore, for these and other manifest errors appearing in the record, the Seaboard Air Line Railway prays that the said judgment of the Supreme Court of the State of North Carolina, dated the fourth day of May, 1910, be reversed, and a judgment rendered in favor of the defendant Company, and for costs.

May 12th, 1910.

WALTER H. NEAL,
BENJAMIN MICOU,

Attorneys for the Seaboard Air Line Ry.

164

The Supreme Court of North Carolina.

SEABOARD AIR LINE RAILWAY, Plaintiff in Error,
vs.

E. N. DUVALL, Defendant in Error.

Bond.

Know all men by these presents, that we, Seaboard Air Line Railway, a corporation duly created and existing under and by virtue of the laws of the States of North Carolina and Virginia, the principal office of which is in the city of Portsmouth, and State of Virginia, as principal, and National Surety Company, as surety, are held and firmly bound unto E. N. Duvall, the above named defendant in error, in the full and just sum of forty thousand dollars, (\$40,000.00), for the payment of which sum well and truly to be made, we hereby jointly and severally bind ourselves, and each of our successors, firmly by these presents.

Sealed with our seals and dated this the 12th day of May 1910.

Whereas, lately at a hearing had before the Supreme Court of North Carolina, in a suit depending in said Court between the said E. N. Duvall as the plaintiff, and said Seaboard Air Line Railway, as defendant, a final judgment was rendered against the said Seaboard Air Line Railway and the said Seaboard Air Line Railway seeks to prosecute its writ of error to the Supreme Court of the United States to reverse the said final judgment.

Now therefore, the condition of this obligation is such that if the said Seaboard Air Line Railway, as plaintiff in error, shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged against it if it shall fail to make good its plea,

then this obligation shall be void; otherwise to remain in full force and effect.

165 SEABOARD AIR LINE RAILWAY.
W. A. GORE, *Superintendent.*

[Seal National Surety Company, New York.
Incorporated 1897.]

NATIONAL SURETY COMPANY,
By WALTER H. NEAL, *Att'y in Fact.*

The foregoing bond is approved and the same is to operate as a supersedeas.

WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

166 Know all men by these presents, that the National Surety Company, a corporation duly organized and existing under the laws of the State of New York, hath made, constituted and appointed and does by these presents, make constitute and appoint Walter H. Neal of Laurinburg and State of North Carolina, its true and lawful attorney, with full power and authority hereby conferred in its name, place and stead, to sign execute and acknowledge any and all bonds not exceeding Fifty Thousand Dollars (\$50,000) each in amount, required to be given by the Seaboard Air Line Railway Company in court proceedings or actions at law, and to bind the National Surety Company thereby as fully and to the same extent as if such bonds were signed by the President, sealed with the common seal of the company, and duly attested by its secretary, hereby ratifying and confirming all the acts of said attorney pursuant to the power herein given. This power of attorney is made and executed pursuant to and by authority of the following By-Law adopted by the Board of Directors of the National Surety Company at a meeting duly called and held on the second day of February, 1909: "Article XII. Resident Officers and Attorneys in fact. Sec. 1. The President, First Vice President, or any other vice president, may from time to time appoint resident vice presidents, resident assistant secretaries and attorneys-in-fact to represent and act for and on behalf of the company, and either the president, first vice president or any other vice president, the board of directors or the executive committee may at any time remove any such resident vice president, resident assistant secretary or attorney-in-fact and revoke the power and authority given him. Section 4. Attorneys-in-Fact. Attorneys-in-fact may be given full power and authority to execute for and in the name and on behalf of the company, any and all bonds, recognizances, contracts of indemnity and other writings obligatory in the nature of a bond, recognizance or conditional undertaking; and any such instrument executed by any such attorney-in-fact shall be as binding upon the company as if signed by the president and sealed and attested by the secretary."

In witness whereof the National Surety Company has caused these presents to be signed by its First Vice President and its cor-

167 porate seal to be hereto affixed, duly attested by its Assistant Secretary, this second day of February, A. D. 1910.

NATIONAL SURETY COMPANY,
[L. S.] By WILLIAM J. GRIFFIN,
First Vice-President.

Attest:

W. I. HAWKS,
Assistant Secretary.

STATE OF NEW YORK,
County of New York, ss:

On this second day of February A. D. 1910, before me personally came William J. Griffin, to me known, who being by me duly sworn did depose and say, that he resides in the City of New York; that he is the First Vice-President of the National Surety Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

[L. S.] WM. M. WEAVER,
Notary Public, New York County.

168 Supreme Court of North Carolina.

I, Thos. S. Kenan, Clerk of the Supreme Court of North Carolina, do certify the foregoing to be a true, correct and perfect copy of the record in the case of E. N. Duval against the Seaboard Air Line Railway Company, as appears from the files in said court.

Given under my hand and seal of said court at office in Raleigh, this 24th day of May, 1910.

[Seal of the Supreme Court of the State of North Carolina.]
THOS. S. KENAN,
Clerk Supreme Court of North Carolina.

Endorsed on cover: File No. 22,199. North Carolina Supreme Court. Term No. 578. Seaboard Air Line Railway, plaintiff in error, vs. Ernest N. Duvall. Filed May 27th, 1910. File No. 22,199.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1885.

SHADWELL AIR LINE COMPANY,

Plaintiff in Error,

vs.

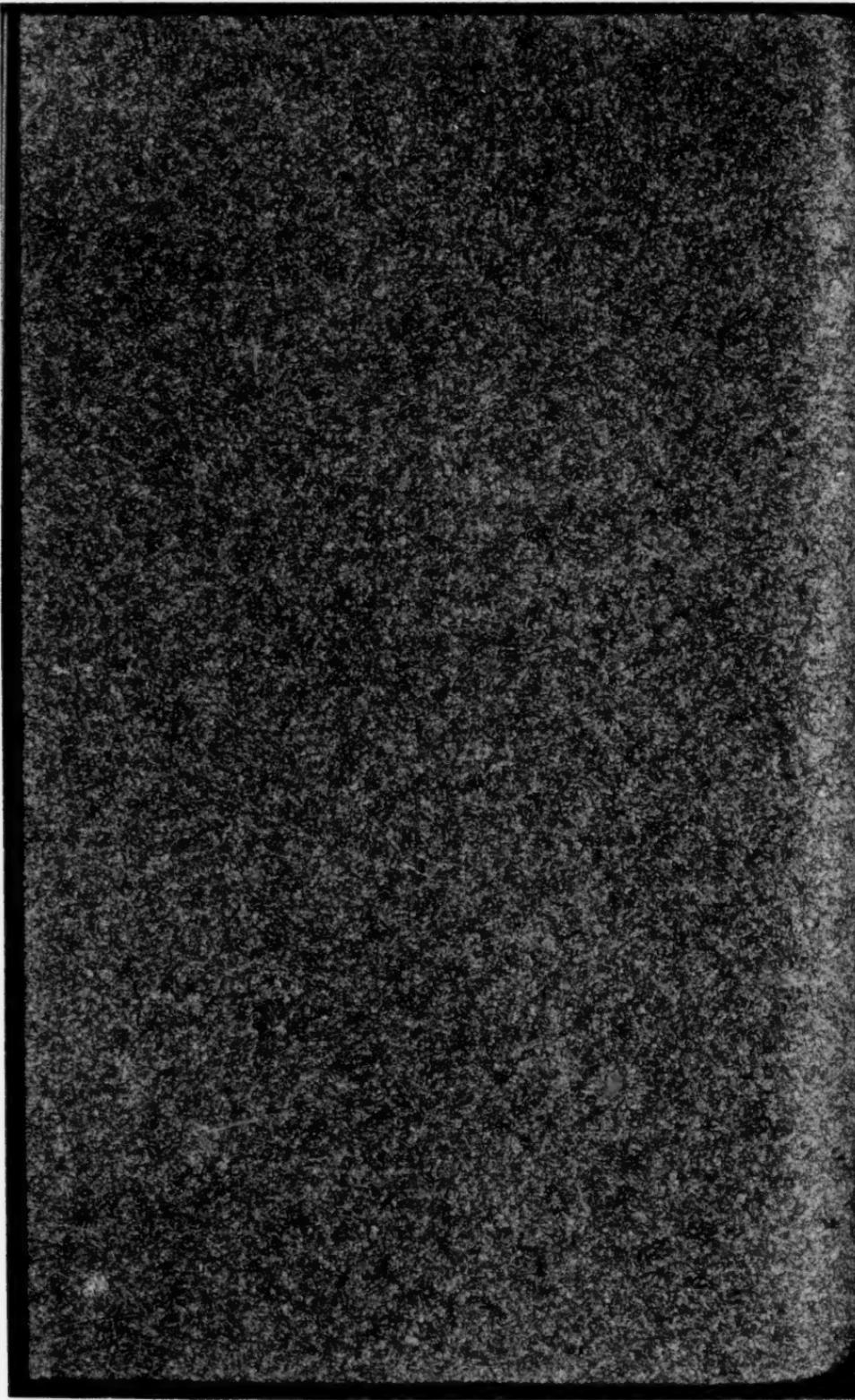
CHARLES N. DUVALL,

Defendant in Error.

No. 804

Plaintiff in Error's Brief on the Motion of
Defendant in Error to Dismiss the Writ,
or Admit the Opinion and Judgment
Rendered in the Supreme Court of North
Carolina.

MILARY A. NEWMAN,
SAMUEL T. COOK,
RICHARD K. WHITELAW,
WALTER C. HALE,
E. V. CANNON,
Counsel for Plaintiff in Error.



IN THE
Supreme Court of the United States.

October Term, 1910.

SEABOARD AIR LINE RAILWAY,
Plaintiff in Error, }
v.
ERNEST N. DUVALL,
Defendant in Error. } No. 578.

**PLAINTIFF IN ERROR'S BRIEF ON THE
MOTION OF DEFENDANT IN ERROR
TO DISMISS THE WRIT, OR AFFIRM
THE OPINION AND JUDGMENT RENDERED
IN THE SUPREME COURT OF
NORTH CAROLINA.**

Statement.

The case comes before this court upon a writ of error allowed by the Chief Justice of the Supreme Court of North Carolina (p. 101, Rec.), the justice who rendered the opinion of the court when the case was before the Supreme Court of North Carolina.

The writ was asked for upon the ground that the suit was brought under the Federal Employers' Liability Act of 1908, and that in the highest court of the State in which a decision in said cause could be had ^{plan to do in due}, privilege or immunity was specially set up by ^{plan to do in due} and claimed under a statute of the United States—the Employers' Liability Act of 1908,—and that the final judgment of that court was

against the right, privilege or immunity so set up and claimed.

The defendant in error moves to dismiss the case here for want of jurisdiction, upon the grounds—

1. That the Employers' Liability Act of 1908 grants no right, privilege or immunity to the plaintiff in error.

We need not directly discuss this contention further than to make plain what was the right, privilege and immunity denied us under the act.

The act modifies the common law and the statute law of North Carolina to the extent of favoring such employees *as come within its provisions*. As to such employees a liability is fixed upon the defendant carrier, in all cases where the injury results in whole or in part from the negligence of any of the officers, agents or employees of the carrier, and by section 3 of the act the established rule of the common law and statute law of North Carolina, that contributory negligence of the plaintiff bars recovery against a defendant, is abrogated to the extent that where there is contributory negligence the plaintiff may still recover, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to the employee, plaintiff.

It would indeed be anomalous that an act increasing the liability of an employer to an employee granted no right, privilege or immunity to the employer which he could set up in an action against him. It needs no argument to establish that where an employer's liability is increased by a Federal statute that it is at least the right of the employer to have the statute construed, if not strictly, at least—which answers the purpose of our contention—correctly. If this is aptly claimed and denied, a right, privilege or immunity is certainly set up and the decision rendered against the same. Our contention here is that we sought, at a proper time and in a proper

way, a correct construction of this act. That this was denied to us in the trial court, and upon appeal was again set up, and denied to us in the highest court of the State.

Without enumerating the other grounds for dismissal (2 to 6 of the motion to dismiss, pp. 1, 2, Rec.), we will state that they are to the effect that no right, privilege or immunity was set up in either court; that no Federal question was presented to or decided by the State courts; that no decision of a Federal question was necessary to determine the case; and that the case was decided on broad principles of common law requiring no interpretation of the act.

These grounds can all be disposed of by a

Statement of Plaintiff in Error's Case.

(A) This was a civil action instituted by the defendant in error against the plaintiff in error under the Federal Employers' Liability Act of 1908.

(B) It was tried by the trial court of the State of North Carolina, under this Federal statute.

(C) The highest court of the State, the Supreme Court, reviewed the case under this Federal statute.

(D) The writ of error was granted by the Chief Justice of the Supreme Court of North Carolina, the Justice who rendered the opinion in the case, upon a petition considered by him, that declared that the case was brought under the Federal statute; that certain Federal questions were presented to his court, and that the construction placed upon the same by said court was adverse to the construction asked by the plaintiff, of those questions.

(E) The case must have been tried under the Federal act, and not under the State law.

As to

(A) This was a Civil Action Instituted by the Defendant in Error Against the Plaintiff in Error under the Federal Employers' Liability Act of 1908.

The defendant in error here was plaintiff in the trial court. He studiously avoids, both in the grounds stated for his motion to dismiss, and in his argument before this court, any direct assertion that he was not suing under the statute. On page 11 of his brief, arguing that the question of contributory negligence was eliminated from further consideration after the jury in the trial court found that there was no contributory negligence, he lays down this remarkable proposition :

"That is to say, the Federal Employers' Liability Act of 1908 differs only in one particular from the common law as modified by the State law of North Carolina, and that is in respect to 'comparative negligence.' With this question eliminated by the finding of the jury, that there was no contributory negligence on the part of the defendant in error, the trial was forced to proceed under the principles of the common law in respect to master and servant."

(Brief, p. 11.)

In other words, it is permissible to swap horses crossing a stream, and by such sleight of hand as the finding of a fact by the jury change, *Medias res*, a suit brought under a Federal statute to one brought under a State statute or at common law. Before this court such argument answers itself.

Counsel admits:

"Full faith, credit and validity was given to the Employers' Liability Act of 1908, in so far as the same touched or applied to this case in the trial court."

(p. 12, of his brief.)

Yet he says:

"In sifting this matter down the court will find that the Federal Employers' Liability Act of 1908 was not drawn in question; that there was no decision against its validity and that no construction was put upon said act by the trial court below, or the Supreme Court of North Carolina; that no right, privilege or immunity was claimed by the plaintiff in error under the said Federal Employers' Liability Act, nor was the said act in any way passed upon by either of said courts."

(p. 18, of his brief.)

The record itself is the best evidence that the suit was instituted under the act.

For the convenience of the court the statute in full is set forth below.*

The action was originally instituted against the receivers of plaintiff in error, but before the trial of the case

* *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, that every common carrier by railroad while engaged in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia or any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he was employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and if none, then to the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Section 2. That every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States, shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent

the receivers having been discharged by an interlocutory decree the action abated as to the receivers, and the plaintiff in error having come in and made itself a party defendant, the case was tried upon the original complaint (p. 2, Rec.), and answer filed by plaintiff in error (pp. 9, 10, 11, Rec.)

The complainant alleges that the plaintiff in error here was

"operating the said railroad as a common carrier in the transportation of passengers and freight, and * * * were operating a line of railway from Portsmouth, Va., via Moncure, N. C., and other points and stations to Monroe, N. C., and points beyond."

(Sec. 1 of complaint, p. 2, Rec.)

The above is an allegation that the plaintiff in error upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Section 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Section 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of the employees contributed to the injury or death of such employee.

Section 5. That any contract, rule, regulation, or device whatso-

here was a common carrier, by railroad engaged in interstate commerce, within the meaning of the act.

The complainant further alleges that

"On the 12th and 13th days of March, 1909, the plaintiff * * * was in the employ of the defendants as baggage master and flagman on one of defendants' passenger trains which was being operated from Portsmouth, Va., to Monroe, N. C., and on the night of the 12th of March, 1909, the said train * * * left Portsmouth * * * and proceeded on its way south towards Monroe, N. C., and plaintiff was in and upon said passenger train in the discharge of his duties as baggage master and flagman.

"See. 3. That when said passenger train had reached a point on defendants' railway, a short distance south of Monroe, N. C., on the morning of March 13 * * * the defendants negligently, and carelessly and recklessly

ever, the purpose or intent of which shall be to enable any common carrier to exempt himself from any liability created by this act, shall to that extent be void: *Provided*, that in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity, that may have been paid to the injured employee, or to the person entitled thereto on account of the injury or death for which said action was brought.

Section 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

Section 7. That the term "common carrier" as used in this act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

Section 8. That nothing in this act shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other act or acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the act of Congress, entitled "An act relating to liability of common carriers in the District of Columbia and Territories, and to common carriers engaged in commerce between the States and between the States and foreign nations to their employees," approved June eleventh, nineteen hundred and six.

Approved April 22, 1908.

started and ran a heavily loaded and rapidly moving freight train, drawn by a locomotive engine, upon the same track and in the direction of said approaching passenger train *upon which plaintiff was employed and engaged in the discharge of his duties*, causing the locomotives of the said passenger and the said freight train to meet in a headon collision. * * * That when the said trains collided, as aforesaid, the plaintiff was * * * seriously, permanently and painfully injured * * * and has been damaged in the sum of seventy-five thousand dollars."

(pp. 2 and 3, Rec.)

No specific reference is made in the complaint to the Federal act by name, but under the rules of pleading this was neither necessary nor proper.

State courts take judicial notice of acts of Congress. It is elementary that all pleadings must state facts, and not conclusions, and the parts of the complaint quoted above allege facts which bring the case within the provisions of the act in question, for it alleges that the defendant was a common carrier engaged in commerce between the States, and that the plaintiff was an employee of such common carrier, and suffered his injury *while he was employed by such carrier in such commerce*.

Mr. Thornton, in his very excellent work on the statute under discussion, has this to say:

"It is not necessary in bringing an action under the Federal statute to specifically refer to it; in fact, it is not good pleading to do so. 'As a matter of pleading, it certainly can not be said that, in order to base a right to recovery on the provisions of the statute, it was necessary to cite the statute or its provisions in the petition.'

"A party desiring to avail himself of the provisions of a public act is only required to state facts which bring his case clearly within it."

Emerson v. St. Louis & H. Ry. Co. 111 Mo. 161;
19 S. W. 1113.

State courts take judicial notice of a general statute of the United States, so that it is enough for a complaint to aver a state of facts showing liability thereunder. *Kansas City, M. & B. R. Co. v. Flippo*, 35 S. O. 457; 138 Ala. 487.

If the allegations of the complaint show that the action is based on a public statute not penal, it is sufficient, without counting on or reciting the statute. *Leone v. Kelly*, 60 A. 136; 77 Conn. 569.

It is not necessary in a civil action to set out a statute or refer to it in a declaration. It is sufficient if the case is brought within its provisions by alleging its requisite facts. *Inhabitants of Peru v. Barrett*, 60 A. 968; 100 Me. 213; 70 L. R. A. 567; 109 Am. St. Rep. 494.

"It is not necessary to bring an action under the Federal statute to specifically refer to it; in fact, it is not good pleading to do so. 'As a matter of pleading, it certainly can not be said that in order to base a right of recovery on the provisions of the statute, it was necessary to cite the statute or its provisions in the petition. The petition, in set words, charged the defendant with negligence in having and operating a car upon which was a defective, worn-out and inoperative coupler, which would not couple by impact. Charging the defendant with negligence was charging that the company had not met or fulfilled the duty imposed upon it by law, with respect to having and keeping the coupler upon the car in proper condition for use. It was not necessary, nor, indeed, permissible, under the rules of pleading, that the petition should set forth the law which had been violated, therefore when the petition charged the defendant with negligence with respect to the coupler upon the car, the defendant must have known, as the car was used in interstate traffic, the act of Congress would necessarily come into consideration in defining the obligations resting upon the defendant company.'"

Voelker v. Chicago, etc., Ry. Co. 116 Fed. Rep. 867; cited and quoted in Thornton's Employers' Liability & Safety Appliance Act, sec. 175.

The contention that from the pleadings the parties must have inferred that the action was one at common law or under the State law, was made in the *Voelker* case *supra*, and answered by the court in the following language:

"It is not for one moment supposable that the officers of the defendant or the learned counsel representing it in this case, are not, and were not, when this action was commenced, fully aware of the provisions of the act of Congress of March 2nd, 1893, and the acts of the General Assembly of the State of Iowa, which now form sections 2079 and 2083, both inclusive, of the Code of the State, and therefore knew that as to cars used in interstate traffic, the obligations of the act of Congress were in force, and as to cars used within the State of Iowa, the named sections of the Code were applicable."

Voelker v. Chicago, etc., Ry. Co. 116 Fed. Rep. 867.

The principle of the above cited case is recognized and applied in the case of *Mo. Pacific Ry. Co. v. Brinkmeier* (Kans.), 93 Pae. Rep. at p. 622, where the court says:

"It is urged that the petition does not state a cause of action under this law (Fed. Safety Appliance Act); that in it there is no averment that the car which inflicted the injury was being used in moving interstate traffic nor any statement equivalent thereto; that there are no facts stated therein which suggest a violation of this Federal statute, but on the contrary, they clearly indicate that the pleader intended to state an ordinary case of negligence. The petition contains an allegation which reads: 'The Mo. Pac. Ry Co. is and was at all of the times hereinafter mentioned, a corporation, legally existing and doing business under and pursuant to the laws of the State of Missouri, and doing business as a railway company as a common carrier in, into, and through the counties of Sedgwick and Reno, in the State of Kansas, and into the States of Colorado * * * and Indian Territory.' Under this averment proof that the defendant was engaged in interstate commerce might be properly introduced. It is

unnecessary to specifically mention this act of Congress in a cause of action predicated thereon. It is sufficient if the pleading contains facts which would suggest to a person familiar with such act that its provisions have been violated. *Voelker v. C. M. & St. Paul Ry. Co.* (C. C.) 116 Fed. 867."

To like effect is the case of *Kan. City M. & D. R. R. Co. v. Flippo*, Ala. 35 So., at p. 460, where the court says:

"The courts of the country take judicial notice of the act of Congress known as the 'Safety Appliance Act,' and where the complaint avers a statement of facts which show a failure on the part of the railroad company to comply with the requirements of the statute, this is sufficient; it not being required to plead specially a general statute. The objection raised to the several counts because of the generality of the averments of negligence is untenable."

But a decision more directly in point, as arising under the Federal Employers' Liability Act of 1908, is to be found in the case of *Lemons, Admr. v. L. & N. R. R. Co. (Ky.)*, 125 S. W., at pp. 702-3, where the court held the case removable from the State to the Federal court upon a complaint setting out generally the facts from which the inference must necessarily be drawn that the injury occurred while the plaintiff's intestate was employed in interstate commerce for the defendant, without making any special reference to the Federal statute,—the court saying:

"It is necessary to set out the (foreign) State statute relied on, but not the Federal statute, if facts are stated that bring the cause of action within the scope of the Federal statute, as the State courts will take judicial notice of acts of Congress, but not of the statute law of other States."

But the question whether the complaint sufficiently

charges a cause of action under the Federal statute being one of pleading is necessarily governed by the State practice, and has been expressly decided in an analogous case by the Supreme Court of North Carolina, in *Hancock v. Railroad*, 124 N. C. p. 222, where the court held a cause of action under the State 'Fellow Servant Act' was sufficiently pleaded by setting out the *acts of negligence* charged, without making any *special reference* to the statute, upon the ground that the court would take judicial notice of the general statutes of its own State.

See also 20 Encl. of Pleading & Practice, p. 594 and Notes.

(B). *It was Tried by the Trial Court of North Carolina under this Federal Statute.*

The highest court of the State in the exercise of its appellate jurisdiction reviewed the question of law passed upon in this case in the trial court, and it passed upon the Federal question here involved by virtue of this appellate jurisdiction. We will therefore show that the case was tried in the trial court under the Federal statute, and that the Federal question was aptly raised there. We will cite first the statement of the trial judge himself and then the proceedings had before him, which substantiate his statement.

After disagreement of counsel, the trial judge settled what the record should be that would go to the Supreme Court on appeal of the case, and under the heading,

"CASE ON APPEAL,"

uses this language:

"This was a civil action instituted by plaintiff and tried under the Employers' Liability Act, passed by the Congress of the United States on the 22nd day of April, 1908, to recover damages for personal injuries sustained by him on the 13th day of March, 1909, as the result of

a collision of the passenger train upon which he alleges he was acting as baggage master, and a freight train, near Sanford, N. C."

(p. 13, Rec.)

This undoubtedly shows that the trial judge considered that he was trying the case under this statute.

Section 1 of the statute provides that the person who may recover must be *an employee* of a common carrier engaged in interstate commerce; and further must have suffered the injury for which he sues "*while he is employed by such carrier in such commerce.*"

Now, section 2 of plaintiff in error's answer denied so much of plaintiff's complaint

"as alleges, either directly or indirectly, that the plaintiff was at the time of his alleged injuries in the employ of the then receivers of this defendant as baggage master and flagman, and in the discharge of his duties as such upon said train."

Section 3 (p. 10, Rec.) admits the collision between the freight train and the passenger train referred to in the complaint, but alleges that at the time of said collision "the plaintiff was riding by permission of the express messenger" in the express car.

Section 6 denies that the collision was due to gross negligence or recklessness of the receivers, but admits that it was due to the carelessness of one or more of their employees (p. 10, Rec.)

The defendant further pleaded that if the plaintiff was injured as the result of the negligence of the then receivers of this defendant, which it denies,

"he caused and contributed to his own injuries, in that he, in direct violation of the rules of said receivers, then in force and known to him, left the baggage car in said passenger train, wherein it was his duty to be, and went

into the express car of said train, which was in the possession of and under the control of the agent of the Southern Express Company, either for the purpose of assisting said express agent in the discharge of his duties, or for some other purpose in nowise connected with the duties of the plaintiff's employment, and while in said express car was injured by the derailment thereof as the result of the collision of said passenger and freight train; but for which negligence and wrongful conduct on the plaintiff's part in leaving said baggage car in violation of the rules of his said employers, and going into the express car for the purposes aforesaid, he would not have been injured."

Evidence was offered and admitted to establish the contention of plaintiff in error on the issues joined in the complaint and answer. For the determination of the jury the court submitted three issues of facts (p. 11, Rec.) :

1. Was the plaintiff injured by the negligence of the defendant?
2. Was the plaintiff's injury caused by his contributory negligence?
3. What damage is the plaintiff entitled to recover?

At common law, and under the statute of North Carolina, contributory negligence of the plaintiff would excuse the defendant. Instead of giving a charge upon this subject which would be appropriate to an action at common law, or under the statute, the trial judge, without exception from either side, gave the following charge:

"If you answer the second issue, yes" (the second issue was whether the plaintiff was guilty of contributory negligence), "then on the question of damages, the court charges you that, in an action like the one being tried, if the jury shall find from the evidence that the plaintiff, an employee of the defendant company, was guilty of contributory negligence; that is, that he contributed to his own injury, such negligence would not bar a recovery, if the defendant was guilty of negligence also, but the damages which the jury shall, under the evidence, assess

to the plaintiff shall be diminished in proportion to the amount of negligence attributable to the plaintiff."

This charge would find no place in an action under the North Carolina statute, or at common law. The North Carolina statute will be found quoted on page 10 of defendant in error's brief. The charge finds a place, though, in a suit under this act and is an application of the provision of section 3 of the act in almost the verbatim language of the section.

We have shown that the plaintiff stated a cause of action under the statute. The defendant's answer likewise joined issue under the statute.

Under the act the plaintiff was not entitled to recover unless the defendant was at the time of the injury engaged in interstate commerce, and unless the plaintiff suffered the injury

"while he was employed by such carrier in such commerce,"

and

"unless the injury resulted in whole or in part from the negligence of some of the officers, agents or employees of such carrier."

If these conditions all obtained, and it was shown that the plaintiff was guilty of contributory negligence, then he was still entitled to damages, but to be diminished by the jury "in proportion to the amount of negligence attributable to him."

WE SOUGHT CERTAIN INSTRUCTIONS TO THE JURY, UPON THE EVIDENCE IN ITS ASPECT MOST FAVORABLE TO THE PLAINTIFF, CONSTRUING THE MEANING OF THIS STATUTE, WHICH WERE REFUSED.

WE ALSO OBJECTED TO OTHER INSTRUCTIONS WHICH IGNORED THE EVIDENCE IN ITS ASPECT MOST FAVORABLE

TO THE PLAINTIFF. IT IS THIS THAT WE RELY UPON AS OUR CLAIM TO HAVING SET UP A RIGHT, PRIVILEGE OR IMMUNITY UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT.

The review of these proceedings by the Supreme Court on appeal we rely upon as a setting up of our right, privilege or immunity before the highest court of the State, and the affirmance there of the judgment of the trial court we rely upon as the denial of our right, privilege or immunity, so set up.

This will receive consideration further on, our purpose under this heading being not so much to show what the Federal question was, or how it was decided, as to show (which we believe we have done) by tracing the proceedings that this case was tried by the trial court of North Carolina under the Federal statute.

(C) *The Highest Court of the State, the Supreme Court, Reviewed the Case under this Federal Statute.*

The Supreme Court of North Carolina had appellate jurisdiction of the case, and all of the proceedings we have cited before the trial court were, the record will show, before the Supreme Court on appeal, and it reviewed the case as it was tried in the trial court. With what the record shows was before it, that court could not have reviewed the case other than as one tried under the statute.

Chief Justice Clark in his opinion leaves no doubt of the fact that he was passing upon the Federal statute under consideration, and that his decision was against a right set up by the plaintiff in error here, for he states specifically that the real points in the controversy lie within a small compass, and that the defendant there, the plaintiff in error here, contended that the plaintiff

was not entitled to recover under the Federal Employers' Liability Act. We quote from his opinion:

"This action was brought for personal injuries sustained by him in a head-on collision near Sanford, on a through train going south. The exceptions are numerous, but the real points in the controversy lie within a small compass. The defendant contends that under the Federal Employers' Liability Act the plaintiff is not entitled to a recovery for three reasons:

1. That at the time of the injury the plaintiff was not an employee of the defendant.
2. That he was not injured while engaged in interstate commerce.
3. That he was not injured as a result of defendant's negligence."

(Rec. p. 91.)

The rules of this court require the opinion of the highest court of the State to be certified up as a part of the record; and decisions of this court are numerous that such opinions may always be examined to ascertain whether the Federal question was presented and passed upon by the highest court. By Sec. 1548, revisal of 1905 of the statutes of North Carolina, justices of the Supreme Court are required to deliver their opinions in writing, and provision is made for the filing of these opinions as records of the court.

In the case of *San José Land & Water Co. v. San José Ranch Co.* 189 U. S. 180, Mr. Justice Brown held that under the rule of this court requiring opinions to be sent up with the record, it had been frequently held that where it appeared the Federal question was fully considered in the opinion of the court, that was a sufficient compliance with the words "specially set up and claimed."

Likewise, in *Grosse v. U. S. Mortgage Co.* 108 U. S. 477, Mr. Justice Harlan commented upon the duty of

this court to examine the opinion of the Supreme Court of Illinois, saying:

"Any difficulty existing upon this subject is removed by that provision of the Revised Statutes of Illinois which requires not only that the justices of the Supreme Court of the State shall deliver and file written opinions in cases submitted to it, but that such opinions shall also be spread at large upon the records of the court."

In the case of *Fire Association of Philadelphia v. State of New York*, 119 U. S. 110, where the record did not disclose that any Federal question had been presented, either in the trial court or the intermediate court of appeals, but was presented and passed upon by the Court of Appeals of the State, *Mr. Justice Blatchford* stated:

"But in view of what was said in *Murdock v. Memphis*, 20 Wall. 590, 633, and other cases cited in the opinion, we think that we are at liberty to look into the opinion of the Court of Appeals, a copy of which, duly authenticated by the proper officers, is transmitted to us with the record, in compliance with our eighth rule, for the purpose of aiding and determining what was decided by that court."

Even in cases where the Federal question was first raised in a petition for a rehearing, after the case had been decided adversely by the Supreme Court of the State, this court has taken jurisdiction, recognizing, of course, the distinction between those cases where the Federal question was passed upon in refusing the rehearing, and those cases where the rehearing was refused without passing upon it.

In the case of *Mallett v. State of North Carolina*, 181 U. S. 592, *Mr. Justice Shiras*, after referring to cases holding that the Federal question had not been duly raised, when presented on a petition to rehear, says:

"But these were cases in which the Supreme Court of the State refused the petition for a rehearing, and dismissed the petition without passing upon the Federal questions. In the present case, as already stated, the Supreme Court of the State of North Carolina did not refuse to consider the Federal questions raised in the petition, but disposed of them in an opinion found in this record (citing the case). Had that court declined to pass upon the Federal questions, and dismissed the petition without considering them, we certainly would not undertake to revise their action."

In a more recent case, of *Leigh v. Green*, 193 U. S. 85, Mr. Justice Day stated:

"In the motion reference is made to the failure of the Nebraska Supreme Court to decide the claim therein-before made, that the statute of Nebraska was unconstitutional, because of the alleged violation of the right to due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. Be this as it may, the Supreme Court of Nebraska entertained the motion, and decided the Federal question raised against the contention of the plaintiff in error. In such case the question is reviewable here, although first presented in the motion for rehearing."

Defendant in error's contention that no Federal question was presented is preposterous, in the face of the record. As stated by the Chief Justice of North Carolina, the real points in controversy lay within a small compass, correctly defined by him as defendant's contention that under the Federal Employers' Liability Act the plaintiff was not entitled to a recovery, and giving as the reasons of the contention the identical reasons we rely upon here to show that the Federal question was presented.

(D) *The writ of error was granted by the Chief Justice of the Supreme Court of North Carolina, the justice who rendered the opinion in the case, upon a petition considered by him, that declared that the case was brought under the Federal statute; that certain Federal questions were presented to his court, and that the construction placed upon the same was adverse to the construction asked by the plaintiff of those questions.*

We fully understand that statements in the petition for a writ of error allowed by the court of last resort, are not of themselves sufficient to confer jurisdiction. Under the circumstances of this case, though, the granting of the writ by the Chief Justice is certainly corroborative of his statement that the contention of the plaintiff in error here, made before him, was that under the Federal Employers' Liability Act the defendant in error was not entitled to recover. The Chief Justice's statement that the question was before him, and passed on, is so explicit as really to need no explanation, but we cite his certificate merely as corroborative, and because it has been held by this court in some recent cases that such certificate is explanatory.

In the case of *Illinois v. McKendree*, 203 U. S. 525, Mr. Justice Day refers to the fact that

"Such a certificate may serve to elucidate the determination of whether a Federal question exists."

See also *Rector v. City Bank*, 200 U. S. 405-412; *Marvin v. Trout*, 199 U. S. 21.

In *Fire Assn. of Phil. v. New York*, 119 U. S. 110, it is held that a dissenting opinion may be considered for the purpose of elucidation.

(E.) The Case must have been Tried under the Federal Act and not under the State Law.

We believe that we have established beyond controversy from facts already cited, that this case was tried under the Federal act. The pleadings show that the plaintiff brought his action under the provisions of this act. His brief studiously avoids denying that he did not. He availed himself of the advantages which the act gave to recover under the doctrine of comparative negligence, a right he did not have under the common law or the State law. It is clear he invoked the act. Having done so, it is our contention that the case must have been tried under that act, and could not be tried under the State law, as the Federal act as to cases coming within its purview supersedes the local State law, both common and statutory.

In discussing the exclusive character of the Employers' Liability Act of 1908, and its effect upon State laws, *Thornton*, in his work on *Employers' Liability and Safety Appliance Acts* (Sec. 17, p. 31), says:

"If it be construed that the Federal Employers' Liability Act covers every instance of any person suffering an injury while he is employed in commerce between any of the several States or Territories, * * * then all State regulations—at least those changing or modifying the common law liability—are void, because Congress has manifested a desire, and has covered the whole subject so far as giving a statutory action is concerned. The entire question resolves itself into a matter of construction. A careful reading of the statute would seem to indicate that Congress has covered the entire subject of liability of an interstate railroad company for negligence to its employees engaged in interstate commerce; and that is the consensus of opinion of those who have carefully examined the statute."

While this question has not yet been passed upon by

this court, which, so far as we know, has never had the Federal Employers' Liability Act of 1908 before it for construction, yet we find that the inferior Federal courts have, in several instances, held that the act supersedes both the common and statutory law of the several States bearing on the subject covered by said act.

In the case of *Fulgham v. Middling Valley R. R. Co.* (C. C.), 167 Fed. Rep. at p. 662, the court, in discussing the question, says:

"It is clear that the act of April 22nd, 1908, *supra*, superseded and took the place of all State statutes regulating commerce by railroads. It covered not only injuries sustained by employees engaged in that commerce, resulting from the negligence of the master and his servants, and from defects in the designated instrumentalities in use in that commerce, but also dealt with contributory and comparative negligence and assumed risk, making, in certain cases, at least, the master an insurer of the safety of the servant while in his employment in that commerce. It covers and overlaps the whole State legislation and is therefore exclusive. All State legislation on that subject must give way before that act. *Miss. R. R. Com. v. Ill. Cent. R. R. Co.* 203 U. S. 335; 27 Sup. Ct. 90, 51 Law Ed. 209; *Sherlock et al. v. Alling, Administrator*, 93 U. S. 104; 23 L. Ed. 819.

"These last cases serve to show until Congress has acted with reference to the regulation of interstate commerce, State statutes, regulating the relation of master and servant incidentally affecting interstate commerce, but not regulating or obstructing it, may be given effect; but when Congress has acted upon a given subject, State legislation must yield.

"In *Gulf, Col. etc., Ry. Co. v. Hefley*, 158 U. S. 99; 15 Sup. Ct. 804, 39 L. Ed. 910, the court said: 'When a State statute and a Federal statute operate upon the same subject-matter and prescribe different rules concerning it, the State statute must give way.'

To the same effect is the opinion of Judge Newman in

the case of *Dewberry v. So. Ry. Co. (C. C.)*, 175 Fed. Rep. 307.

Also the opinion of Judge Maxey in the case of *Clark v. So. Pac. Co.* 175 Fed. Rep. 122; and *Cound v. Atchison, T. & S. F. Ry. Co.* 173 Fed. Rep. 527.

Turning to the decisions of the State courts on this point we find that the Court of Appeals of Ky., in *Lemons, Admr. v. L. & N. Ry. Co.* 125 S.W. Rep., cited *supra*, in referring to the Federal act in question, said, p. 103:

"It is a law of general application. Wherever interstate commerce is engaged in, the law is in force. Its provisions are binding alike upon the State and Federal courts. In short, in so far as it is applicable, it is the supreme law of the land. And so it is not only the right, but the duty of all the courts, State and Federal alike, to give effect to its provisions when they are invoked by a person having the right to rely upon them."

To like effect is the case of *State v. Tex. & No. R. R. Co. (Tex.)*, 124 S. W. 984, where the court of civil appeals said:

"It is well settled that the power of Congress to regulate interstate commerce under the provisions of the Constitution before mentioned, is plenary and includes the power to prescribe the qualifications, duties, and liabilities of the employees of railway companies engaged in interstate commerce and any legislation by Congress on such subject supersedes any State law upon the same subject."

See also *Calhoun v. Cent. of Ga. Ry. Co. (Ga.)*, 67 S. E. p. 274, where the State court directed the removal of a case from the State to the Federal court, where the allegations of the complaint brought the facts within the provisions of the Federal act in question, upon the ground that that act superseded the State law covering the same subject.

The record shows conclusively that the action was

brought under the statute; that being so, it must have been tried under the statute, and the record shows that it was so tried.

We have established that the action was brought under the Federal statute, and tried under such statute in both the trial court and the highest court of the State, and we will now treat of the right, privilege or immunity set up in the highest court under the Federal statute, and whether the decision was against such right, privilege or immunity.

The Federal Question Set Up, and the Right Denied Thereunder.

Our claim to the jurisdiction of this court rests upon the fact—

1. That the judicial power of the United States extends "to all cases in law * * * arising * * * under the laws of the United States."

Constitution, Art. 3, Sec. 2.

And

2. The following part of the jurisdictional act found in the Revised Statutes, Sec. 709:

"Or where any right, title, privilege or immunity is claimed under * * * any * * * statute of * * * the United States, and the decision is against the right, title, privilege or immunity specially set up or claimed by either party under such * * * statute."

We will avoid repetition as far as possible.

To state to the court squarely our case,—

We believe we have established that the suit was brought and the case tried in the State courts under the Federal act. If so, then presumably the proceedings had at the trial are properly referable to that act, and the

rights and liabilities of the respective parties arise under the act. The plaintiff below alleged in his complaint, and offers evidence in support of the allegation, that he was injured while actually employed by the receivers of the plaintiff in error in interstate commerce. That is, while actually engaged in discharging the duties of a baggage master on a passenger train being operated by said receivers between Portsmouth, Va., and Monroe, N. C. This having been his allegation, it follows that if he recovers it must be upon proof conforming to said allegation. He could not sue under the Federal statute and recover at common law.

The plaintiff in error in its answer denied that the defendant in error—

"was, at the time of his injuries, in the employ of the then receivers * * * as baggage master and flagman, and in the discharge of his duties upon said train. * * *"

(Rec. p. 10.)

Thus squarely meeting and traversing the allegation of the defendant in error, that he was injured *while employed in interstate commerce by said receivers.*

WE WISH TO MAKE IT PLAIN THAT WE DO NOT ASK THIS COURT EITHER TO GO INTO ANY CONTROVERTED QUESTIONS OF FACT, OR TO PASS ON THE ADMISSIBILITY OF ANY EVIDENCE EXCLUDED FROM THE JURY, BUT WE CONTEND WE WERE ENTITLED TO INSTRUCTIONS CONSTRUING THE LAW AS APPLICABLE TO ADMITTED EVIDENCE IN ITS ASPECT MOST FAVORABLE TO THE PLAINTIFF IN ERROR.

This evidence was before the trial court, before the Supreme Court of North Carolina, on its review of the case, and is set out in the petition for a writ of error allowed by the Chief Justice of the Supreme Court of North Carolina. In the petition it will be found on pp. 94-97, Rec.

There it will be seen that evidence was admitted to the effect that some half hour before the injury the defendant in error had abandoned his post of duty in the baggage car, and in direct violation of rules of the receivers known to him, had gone into the express car, which was under the control and supervision of the Express Company and not of the railroad, where he remained some half hour in assisting the express messenger in the discharge of his duties, and where he was at the time of the injury.

There was also evidence admitted tending to show that had the defendant in error remained in the baggage car according to the rules of the plaintiff in error, if injured at all his injury might have been considerably less. Evidence of N. W. Kelley, pp. 39-40; C. G. Petty and O. P. Makepeace, p. 40, Rec.

Upon this evidence we claim that we were entitled to certain instructions denied, construing that provision of the act which required that in order to recover the plaintiff must, at the time, have suffered his injury while employed by the common carrier in interstate commerce; and upon the further question of what constituted negligence of the carrier under such a state of facts, as that term is used in the statutes.

"Where a party relies upon an Act of Congress, and the questions construed by the court, and upon which the case turned, were whether the party had brought himself within the scope of that act, a Federal question is presented."

San José Land & Water Co. v. San José Ranch Co.
189 U. S. 177.

If, as contended by the plaintiff in error, he was not injured "while employed in interstate commerce," he did not bring himself within the scope of said act, and whether he did ~~not~~ depends upon the construction which the court should put upon the act in the light of the testimony in

the case. In other words, if upon proper construction of the Federal act, the evidence, when considered in the light most favorable to the plaintiff in error, would show that the defendant in error was not within the meaning of the act, injured while employed in interstate commerce, then the Federal question clearly arose upon the trial of the case.

This principle is most clearly enunciated and applied in the recent case of *St. L. I. M. & S. R. Co. v. Taylor*, 210 U. S. 281 (52 L. Ed. 1061), where the defendant in error brought an action to recover damages for the death of her intestate, on account of the alleged negligence of the plaintiff in error, arising out of the violation of the Federal Safety Appliance Act (27 Stat. at L. 531, chap. 196 U. S. Compil. Statute. 1901, p. 3174), in that the railroad had failed to equip certain freight cars with draw-bars of the standard height required by the provisions of said act. There was testimony on the part of the administratrix tending to show that there was a variation of four inches in the height of the draw-bars of the two cars between which her intestate was killed, while the testimony of the railroad tended to show that there was a variation of from one to three inches between said cars, one of which was fully, and the other partially loaded. The right of the plaintiff to recover under the Federal statute turned upon which view of the testimony the jury should adopt, as the case did not come within the statute unless the variation exceeded three inches; and the Circuit Court of Arkansas was requested to so instruct the jury, but refused to do so, and in lieu thereof charged, in substance, that this variation of three inches, within the meaning of the statute, only applied where one car was empty and the other loaded to its *full capacity*. This charge being sustained by the Court of Appeals of Arkansas, the case was brought to this court by writ of

error, where the final judgment of the State court was reviewed and reversed, upon the ground that the State court had not put a proper construction upon the Federal act, *in the aspect of the testimony most favorable to the railroad.*

In discussing the contention of the defendant in error, that a Federal question was not raised by the record in the case, *Mr. Justice Moody*, after reviewing the conflicting testimony as to the variation in the height of the draw-bars of the two cars in question (p. 288) said:

"The evidence, therefore, in its aspect most favorable to the plaintiff, tended to show that the fully loaded car was equipped with an automatic coupler which, at the time, was four inches lower than the link and pin coupler of the lightly loaded car. On the other hand, the evidence, in its aspect most favorable to the defendant, tended to show that the automatic draw-bar of the loaded car was exactly one inch lower than the link and pin draw-bar. It was the duty of the jury to pass upon this conflicting evidence, and it was the duty of the presiding judge to instruct the jury clearly as to the duty imposed upon the defendant by the act of Congress."

Again, at page 293:

"Where a party to litigation, in a State court, insists by way of objection to, or requests for instructions, upon a construction of a statute of the United States which will lead to, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect being duly set up, is denied by the highest court in the State, then the question thus raised may be reviewed in this court. The plain reason is that, in all such cases he has claimed in the State court a right or immunity under a law of the United States, and it has been denied him. Jurisdiction so clearly warranted by the Constitution and so explicitly conferred by the act of Congress, needs no justification. *But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be*

secured so that they shall have the same meaning and effect in all the States of the Union." (Italics ours.)

In support of his opinion *Mr. Justice Moody* cited and quoted from the case of *Cohen v. Va.* 6 Wheat. 264; 5 L. Ed. 257, as follows:

" It was said in that case (p. 416) : ' They (the words of the Constitution) give to the Supreme Court appellate jurisdiction in all cases arising under the Constitution, laws and treaties of the United States. The words are broad enough to comprehend all cases of this description in whatever court they may be decided ; ' and it was further said (p. 379) : ' A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either.' "

Applying the principle of these cases to the facts in the case at bar, we respectfully contend that the right of the defendant in error to recover under the Federal statute, upon the *evidence* in the case, necessarily depended upon the *proper construction* of said statute, and that there can be no doubt that a Federal question arose upon the trial of this case.

We plant ourselves squarely upon the following language of *Mr. Justice Moody*, quoted above:

" Where a party to litigation in the State court insists, by way of objection to, or request for instructions, upon a construction of a statute of the United States which will lead, or on possible finding of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect being fully set up, is denied by the highest court of the State, then the question thus raised may be reviewed in this court."

The only argument the defendant in error offers to meet our contention is that even if a Federal question might

have arisen in the trial of the case, that we did not properly and seasonably present and insist upon the same in the trial in the highest court of the State, and therefore this court is without jurisdiction to review.

To support this argument, he contends that the records show that the instructions prayed by the plaintiff in error, and the charges given by the court, were predicated upon the presumption that the case was being tried at common law, and not under the Federal statute. In reply to this we would say, we have already shown that the action was in fact brought under the Federal Employers' Liability Act. As that act superseded the State law, both common and statutory, it follows that the only cause of action the defendant in error had, according to the allegations of his complaint, was under the Federal statute. There was nothing else before the court to try. So presumably the instructions prayed by the plaintiff in error, as well as the charges of the court given in lieu thereof, were predicated upon the rights, duties and obligations imposed upon the respective parties by the Federal statute.

The Federal Question was Properly and Seasonably Presented in the Court Below.

The question of the validity and constitutionality of the act is not raised, but only the question of the *correct construction* of the same. The defendant in error here brought the railroad into court by the usual summons, after which he filed his complaint, in which he alleged facts showing that the said railroad was engaged in commerce; that he was employed by the defendant in such commerce, and while so employed was injured by the negligence of the defendant. Under the rules of pleading, as we have before shown, it is at once seen that he brought his action under the Federal Employers' Liability Act of 1908. To the complaint the railroad could

only demur or answer. It could not demur, because a cause of action was stated. Therefore it had to answer. Upon inquiry as to the real facts in the case the defendant railroad was advised that the plaintiff was not, at the time alleged in the complaint, in the employ of the defendant, and therefore for answer to the complaint, denied that the plaintiff in error was injured while employed by said defendant in such interstate commerce. Until the evidence in support of the allegation in the complaint was introduced, and the defendant introduced its evidence in reply, the case closed and the issues framed, there was no opportunity to raise the question.

However, before the argument opened (which is the practice in North Carolina) the court was asked in effect to instruct the jury that if it should find the facts as contended by the defendant in that court, that the plaintiff was not injured while in the employ of the defendant in interstate commerce, it must find for the defendant.

The judge refused to give these instructions, and exception was noted.

Right at this point the Federal question was presented. It was the *first opportunity* to present the same, and under the decision in the *Taylor* case, 210 U. S., heretofore cited, it was the proper way to raise the question.

The court also gave the jury instructions. Manifestly, no exception could be lodged until these instructions were given, for the defendant railway could not know how the judge would construe the statute to the jury. As soon as the instructions were given exception was entered, a federal question was raised *again in apt time and by a proper method.*

Further, we would say that in so far as some of the instructions may have been predicated upon common law principles, we have yet to learn that in the construction of a Federal statute common law principles have no

application. If the common law principles happened to be applicable to the construction of the statute it was not only appropriate but right to invoke them. An examination of the instructions prayed and refused will show that each of them is predicated upon the proposition that *if the jury should find from the evidence that the defendant in error, at the time of his injury, had, in violation of the rules of his employer, abandoned his post of duty and gone elsewhere to assist the employee of another company to discharge his duties, then he would not be injured while he was employed by this defendant in interstate commerce*, and consequently would not have brought his action within the scope of the Federal act.

While the Federal act is broad and comprehensive in its scope and purpose, it does not in express terms attempt to regulate all the rights, duties, and obligations arising out of the relation of master and servant. A defendant is entitled certainly to a correct, and the statute being primarily for the benefit of the employee, we believe to a strict interpretation of the statute, and that it should not be held to include either a plaintiff who has not brought himself within the category of those entitled to sue, or where he has so brought himself, still has failed to bring himself within the requirements of the statute as to the conditions under which he is entitled to recover; and that consequently where a party insists, by way of objection to or requests for instructions, upon a construction of the statute which will lead, or on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim thus duly set up is denied by the highest court in the State, then such question thus raised may be reviewed in this court. The act does not attempt to specifically define negligence, or contributory negligence. It does not undertake to define who, or under what circumstances persons shall be considered as employees by

interstate commerce carriers, in interstate commerce. These questions must be determined by applying to the act the recognized principles of legal construction. This statute, like others passed by Congress, presupposes recognized rules for judicial construction whereby the parties coming under its provisions can be ascertained, and their respective rights, duties, and obligations be gauged and determined. Constant reference must be made to these recognized rules to find who is employer and who is employee, within the meaning of the act, and as to an employee invoking the act, whether when injured he was employed as the act prescribes that he should be—that is, in interstate commerce, and by the carrier whom he is suing.

It is the positive duty of the court to instruct the jury as to the scope and effect of the act, as construed in the light of the recognized principles of judicial construction, and any error committed by the State court in this respect is an erroneous construction of the act, reviewable here, when properly brought before this court; and under the authority of *St. L. I. M. & S. R. Co. v. Taylor*, cited *supra*, the failure of the court to so instruct raises the Federal question.

The opinion of the Supreme Court of North Carolina states that it was contended there that the defendant in error could not recover upon the Federal Employers' Liability Act for the following reasons:

1. Because at the time of the injury he was not an employee of the receivers of the plaintiff in error.
2. He was not injured while engaged in interstate commerce.
3. He was not injured as the result of the negligence of the receivers.

The soundness of each of these reasons upon which we contend that a recovery could not be had under the

Employers' Liability Act, depends upon a construction of that act as applicable to the evidence of the plaintiff in error.

The first reason depends upon who, under that act, was an employee of the defendant.

Presuming employment proved, the second reason would depend upon whether such employee was injured while employed by the carrier in interstate commerce.

The third reason, it having been decided that he was an employee of the receivers, and as such employee was injured while employed by them in interstate commerce, would depend upon whether he was injured as the result of the negligence of the receivers.

These were questions of law to be determined by the court, upon proper instructions given on the evidence. They were not issues of facts to be submitted to a jury, and the record shows they were not submitted, for the only issues submitted to the jury to determine were

1. Was the plaintiff injured by the negligence of the defendant?
2. Was the plaintiff's injury caused by his contributory negligence?
3. What damages was the plaintiff entitled to recover?
(p. 11, Rec.)

Of course those issues of fact must be determined upon proper instructions construing the law, based on the evidence in the case.

We will here state the instructions given, and excepted to, or refused when asked for. Following which, without going any further into the merits of the case than is necessary to intelligently state the question, we will discuss our right to have had the instructions sought, in order to have presented to the jury appropriate instructions construing the act as applicable to the evidence in its aspect most favorable to the plaintiff.

Instructions.

The plaintiff in error in apt time prayed the court to instruct the jury as follows:

" 1. That where an employee undertakes to do something not his duty to do, the master is not negligent; and if the jury shall find by the greater weight of the evidence that the plaintiff was acting outside of the scope of his employment when he was injured, they will find the first issue ' No.' "

(p. 75, Rec.)

His honor refused to give this instruction, and the defendant excepted, which is the defendant's sixteenth exception. *Exception No. 16.*

" 3. That as the plaintiff admits that he was in the express car at the time of his injuries, and as the rules of the receivers of the defendant (of which he admits that he had notice) required him to remain in the baggage car, when not engaged in flagging the train, the burden is upon the plaintiff to satisfy the jury by the greater weight of evidence, that when he went into said express car, and was injured, he was engaged in the *discharge of the duties of his employment*, and if he has failed to so satisfy the jury, you will answer the first issue ' No.' "

(p. 76, Rec.)

His honor refused to give this instruction and the defendant excepted, which is the defendant's eighteenth exception. *Exception No. 18.*

" 4. That unless the jury shall find by the greater weight of the evidence that when the plaintiff went into the express car, he understood that he was going there to discharge some of the duties of his employment, the defendant's negligence in causing the derailment of said car would not be the proximate cause of the plaintiff's injuries, and the jury will answer the first issue ' No.' "

(p. 76, Rec.)

His honor refused to give this instruction, and the defendant excepted, which was the nineteenth exception.
Exception No. 19.

"6. The admitted rules of the receivers of the defendant required the plaintiff to remain in the baggage car when not engaged in flagging the train, and the plaintiff had no right to go into the express car in violation of the provisions of the said rules, unless the conductor ordered him to do so for the purpose of discharging some one of the duties of his employment; and unless the jury shall find by the greater weight of the evidence that when the conductor told the plaintiff to go with him into said car, he thereby understood that the conductor wished him to go to discharge his duties as an employee of the defendant, the jury will answer the first issue 'No.' "

(pp. 76-77, Rec.)

His honor refused to give this instruction and the defendant excepted, which was the twenty-first exception.
Exception No. 21.

On the issue of contributory negligence the court charged the jury as follows:

"If you find from the evidence that the plaintiff had no right to go into the express car; that he was not where he should have been; and you further find that he would not have been injured but for his going into the express car, and that his going into the express car was such an act on his part that a reasonably prudent man ordinarily would not have done under the circumstances of the situation, then he would be guilty of contributory negligence, and it would be your duty to answer the second issue 'Yes.' If you do not so find, it would be your duty to answer the second issue 'No.' "

(p. 80, Rec.)

The plaintiff in error in apt time objected and excepted to the foregoing as being a correct construction of contributory negligence under the Federal Employers' Liability Act.

Based upon these instructions, we will consider the reasons which the Supreme Court of North Carolina states we advanced for our contention that the defendant in error here could not recover upon the Employers' Liability Act, under the following heads:

1. WHERE A SERVANT DEPARTS FROM THE SPHERE OF HIS ASSIGNED DUTIES, THE RELATION OF MASTER AND SERVANT IS CONSIDERED AS TEMPORARILY SUSPENDED, AND HIS POSITION THEN BECOMES THAT OF A TRESPASSER OR A BARE LICENSEE.

According to our contention, *supported by admitted evidence*, the defendant in error, at the time of his injury, *had left his post of duty and, in violation of the known rules of the company, had gone into the express car to assist the express messenger in the discharge of his duties*. Assuming that the jury could have found, under appropriate instructions from the trial court, such to have been the facts of the case, it follows, upon the overwhelming weight of authority, *that while he remained in the express car the relation of master and servant theretofore existing between him and the plaintiff in error was temporarily suspended*, and his position was that of a *trespasser or a bare licensee* upon the train. He was not only *not acting within the line of his duty* when injured, but doing that which the *rules of his employer expressly forbade* (Rec. p. 46). Instead of remaining at his post of duty in obedience to his employer's *express command*, he had, in *wilful disregard of that command*, abandoned *both the work he was employed to do and the place in which he was directed to do it, and had gone to another part of the train, in possession of another corporation, to assist its servant in the discharge of his duties*, and while he was there so engaged he was no more the servant of the receivers of the plaintiff in error than a stranger would have been, and was therefore not

injured while employed by the defendant interstate carrier in interstate commerce within the Federal statute. That this is so, as a matter of law, is elementary.

Says Mr. Thornton, in his work on *Employers' Liability and Safety Appliance Acts* (Sec. 24) :

" It is an interesting question concerning what employee may bring his action upon the statute or claim a right to recover damages thereupon for his injuries. It is tautology to say that he must have been an employee of the defendant at the time of his injury, and be injured in the line of his duty. This is elementary and need not be discussed. In fact, it is here assumed. The statute in part answers the question when it provides that ' every common carrier by railroad while engaged in commerce between any of the several States, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce.'

" This last quoted clause designates the employee who can recover for his injuries; but he must be injured ' while he is employed by such carrier in ' commerce between the States, or between the States and Territories. The word ' while ' is significant * * * for by its terms the employee must be engaged in interstate commerce in order to enable him to recover under the statute."

Discussing the same subject, an eminent author recently said:

" If such unauthorized action (by the servant) is established, it is manifest that, in respect to the work thus done, the relation of master and servant did not exist between the person for whom it was done, and the person who was doing it, and the former did not owe to the latter any of those special duties which are deemed to be incidental to that relation. The workman, under the supposed circumstances, occupies a position which is virtually, if not precisely, that of a trespasser or a licensee."

2 Labatt Master & Servant, See. 629.

And to like effect is the opinion of a recent text writer on the subject:

" If the employee, instead of attending to the business of the employer at the time of the injury, was engaged upon some business of his own, or if the work done by him was outside the scope of his employment, and as the result of the performance of such outside duties he was injured, then the employer is not responsible, for in the performance of such duties the relation of employer and employee did not exist, since he was not employed to do any such service."

White on Personal Injuries on Railroads, Sec. 227.

But Judge Elliott possibly states the proposition herein contended for still more clearly:

" If the time when, and the place where, the injury is received are not within the scope of the contract of employment, the relation of master and servant can not be justly said to exist, and * * * where one employed to do a designated kind of work, or to do work at a particular place, voluntarily undertakes to do some other work, or goes to a place different from that assigned to him by the contract of employment, he can not successfully insist that he is within the protection of the rule that a master must exercise ordinary care to protect him against injury."

3 Elliott on Railroads, Sec. 1303.

While the proposition herein contended for, and so strongly supported by the above-quoted text writers and a wealth of judicial decisions as well, is a rule of common law construction, yet, as already said, we know of nothing that prohibits the application of the rules of common law construction to a Federal statute, to determine its meaning and scope; otherwise the courts would have no recognized means of determining who are masters and who servants, what the scope of the employment, or when the one is guilty of negligence and the other of contributory negligence, etc. To apply these common law principles to an interpretation of a Federal statute is necessary to construe it correctly. Failure to construe a Federal stat-

ute correctly is denial of a right to a party sued under the statute.

2. THE DEFENDANT IN ERROR, NOT HAVING BEEN ACTUALLY ENGAGED IN INTERSTATE COMMERCE AT THE TIME OF HIS INJURY, CAN NOT RECOVER UNDER THE PROVISIONS OF THE FEDERAL EMPLOYERS' LIABILITY ACT.

Assuming, for argument's sake, that the conduct of the defendant in error *in leaving the baggage car and going into the express car, in violation of the rules of the receivers, to assist the express messenger*, did not suspend the relation of master and servant theretofore existing between him and said receivers, still it can not be seriously contended that *being injured when he was in said express car, discharging none of the duties of his employment, he was injured "while employed by the defendant" in interstate commerce*, or, to use the exact language of the act, "*employed by such carrier in such commerce*." So, upon the theory of the evidence of the plaintiff in error, *the question squarely arises for the decision of this court as to the meaning of the words "while he is employed by such carrier in such commerce"* appearing in the first section of the Federal act.

In discussing this language, Mr. Thornton says (Sec. 24):

"If he be an employee of the railroad company and, at the time of his injury, be not engaged in interstate commerce, he can not recover under the provisions of the statute. * * * As the employee must be engaged in the interstate commerce of his employer, from the very nature of the question, his employer, at the moment of the injury, must be engaged in interstate commerce, not generally, but in that specific instance, and in that identical commerce he must be injured if he recovers under the statute."

If this had not been so, this court would not have declared the Federal Employers' Liability Act of 1906 void upon the ground that Congress undertook to protect railway employees *not at the time of their injury actually engaged in interstate commerce.* In giving the reasons for holding the act of 1906 unconstitutional, upon that ground, this court, speaking through *Mr. Justice White*, in *Howard v. Ill. Cent. R. R. Co.* 207 U. S. 463, said:

"Thus the liability of a common carrier is declared to be in favor of 'any of its employes.' As the word 'any' is unqualified, it follows that liability to the servant is co-extensive with the business done by the employer whom the statute embraces; that is, it is in favor of any employee of all carriers who engage in interstate commerce * * * the act then being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of their employees, without qualification or restriction as to the business in which the carriers or their employees may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce."

And in referring to the argument of the Government in support of the constitutionality of the act, by which it sought to place a construction thereon which would confine its application to those employees only who were actually engaged in interstate commerce at the time of their injury, the court further said:

"So far as the face of the statute is concerned, the argument is this: that because the statute says carriers engaged in commerce between the States, etc., therefore the act should be interpreted as being exclusively applicable to the interstate commerce business, and none other, of such carriers, and that the words 'any employee' as found in the statute, should be held to mean any employee, when such employee is engaged only in interstate commerce."

Here it will be noted that it was *conceded* by the Government, in its effort to save the life of the act of 1906, that Congress only had authority to legislate in this respect for the protection of such employees of interstate carriers as are injured while *actually* engaged in interstate commerce. It necessarily follows, we submit, in the light of this decision and the history of the subsequent legislation on the subject, that the act of 1906, both in letter and spirit, limits, and was intended to limit, its benefits to only such of the employees of interstate carriers as are injured while actually engaged in interstate commerce.

We therefore contend that it could hardly be said that this statute applies to the case of the defendant in error, if it be admitted, as a matter of fact, *that he was injured while he was outside of the line of his employment, engaged in assisting the servant of another corporation, in violation of the rules of his employer.*"

2 Labatt, Master and Servant, Sec. 719-720.
Reno Employers' Liability Acts, p. 14.

An analogous question has frequently arisen in the State courts, when called upon to construe local employers' liability acts, and has been decided as herein contended for.

So. Ry. Co. v. Wade (Fla.), 25 So. Rep. 863.
Mellor v. Mfg. Co. (Mass.), 5 L. R. A. 792.
Bean v. R. R. 98 Ala. 586.
1 Dresser Employers' Liability Acts, Sec. 13.

The plaintiff in error offered evidence (Rec. pp. 33-34) which showed that for some *half hour prior to the collision in which the injury occurred, the defendant in error had been in the express car assisting the express messenger Rowe in his work; that the rules of the receivers, of*

which he had notice, required him to remain in the baggage car while on duty, except when required to take the place of the brakeman; (Rec. p. 46), that there was no baggage in the express car on the night of the injury (Rec. p. 34), and that the train crew was not permitted in the express car under the rules of the Express Company, except while in the discharge of train duties (Rec. pp. 47-48), and that these rules were observed, and required to be observed, by the Express Company (Rec. p. 45).

The plaintiff in error, in apt time, by appropriate instructions (Rec. pp. 75-76), requested the trial judge to charge the jury, in substance, that if they should find the facts as above narrated; that is, that the defendant in error, *at the time of the injury had abandoned his post of duty and gone into the express car from the baggage car, in violation of the rules of the receivers, where he was engaged in assisting the express messenger in his work, then the jury must answer the issue of negligence in favor of the plaintiff in error.*

The court not only failed to give these instructions, but charged the jury as follows (Rec. p. 80):

"If you find from the evidence, and the greater weight thereof, the burden being upon the plaintiff, that the plaintiff's injury was caused by the defendant's negligence—proximately caused—you should answer the first issue 'Yes.' "

We submit that the action of the judge, both in *refusing* to give the instructions prayed and in *giving* the above-quoted charge, is clearly obnoxious to the following rule laid down by this court, in *St. L. I. M. & S. R. R. Co. v. Taylor*, 210 U. S. 293, cited *supra*, where the court said:

"Under these instructions the plaintiff was permitted

to recover on proof of this fact alone. From such proof a verdict for the plaintiff would logically follow. The error of the charge was emphasized by the refusal to instruct the jury as requested by the defendant," etc.

So, under the instructions of the judge, in the case at bar, the defendant in error was permitted to recover *solely* upon proof of the fact (which was admitted) that the *collision in which he was injured* was the result of the negligence of the receivers of the plaintiff in error, without any reference whatever as to the disputed question raised *at the very threshold of the case* by the *pleadings* and by the *testimony*, as to whether he was *actually* employed in interstate commerce at the *time* of his injury. Whether he was so employed depended upon the *CORRECT CONSTRUCTION* of the Federal act in question, and in order to put a *proper* construction upon the language of this act, it was necessary for the court to resort to the *settled and well known meaning of the words used in the act, as sanctioned by judicial decision.*

In the case of *Kepner v. U. S.* 195 U. S. 100 (49 L. Ed. 120), this court, speaking through *Mr. Justice Day*, said (p. 121):

"In order to determine what Congress meant in the language used in the act under consideration, 'No person, for the same offense, shall be twice put in jeopardy or punishment,' we must look to the origin and source of the expression and the judicial construction put upon it before the enactment in question was passed."

And again, on page 124:

"It is a well settled rule of construction that language used in a statute which has a settled and well known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body."

We therefore earnestly contend that it was absolutely necessary for the trial court, in interpreting the Federal act, to resort to the "settled and well known meaning" of the words of this act, which have been "sanctioned by judicial decision," based upon recognized rules for judicial construction. Otherwise *each individual State court would be left absolutely free either to extend or restrict the scope and purpose of the act, so as to absolutely thwart the intention of the law-makers by placing thereon its own construction, without reference to the accepted meaning of the words of the act as established by judicial decision.* Thus one State court might construe the words "while he is employed by such carrier in such commerce," to include *intra-state* commerce, and therefore *extend* the benefits of the act *beyond* the power of Congress to legislate, while another State court might declare the above-quoted clause to include *only* such employees as were injured while engaged in the *unusually hazardous* occupations of interstate carriers, thereby unduly *restricting* and *limiting* the meaning and purpose of the act. It therefore necessarily follows that *if a uniform construction is to be placed upon the Federal Employers' Liability Act by the various State courts, this court must clearly define its scope, meaning, and effect, in all its bearings, as regards the relation of interstate carriers to their employees.*

To illustrate, let us assume, as in this case, that the validity and constitutionality of the Employers' Liability Act of 1908 is not raised, but that the question is one of the construction of the Federal statute. We might take the case directly in point. The common carrier is engaged in interstate commerce, and running a railroad from Portsmouth, Va., through North and South Carolina. One Duvall, injured in a collision, who brings his suit, had, we will say, an assistant in his baggage car,

who was employed under the same conditions and subject to the same rules, as himself; that this man had accompanied him into the express car, and that they had both been injured there; that there were no points of difference in the circumstances of the injury, but that the man who had accompanied him was a citizen of South Carolina, and while Duvall sued in North Carolina the latter brought suit in South Carolina; that the judge in North Carolina instructed the jury, as was done in the Duvall case, and ignored all instructions asked construing the statute as to the meaning of the language injured "while employed by such carrier in such commerce," and in other respects as applicable to the evidence in its light most favorable to the defendant. A verdict was given for the plaintiff for \$30,000.00, as was the case here; that on the other hand, the trial judge in South Carolina regarded these instructions and gave them to the jury; that in South Carolina, where the statute was thus construed, the jury believing the defendant's evidence, gave a verdict for the defendant.

We think this illustration shows clearly the necessity for a correct construction of the statute, when sued under in State courts. We further believe that this necessity is clearly recognized both in the jurisdictional act and the decisions of this court.

As many of the cases cited by defendant in error are cases where the Federal question was claimed to have arisen out of consideration of a State statute, it is but proper to call attention to the difference in the provisions of the jurisdictional act, where the Federal question arises out of consideration of a State statute, and where it arises out of consideration of a Federal statute.

The right to review a decision of a State court passing upon a State statute arises,

"where is drawn in question the validity of a statute of * * * any State * * * on the ground of their (its) being repugnant to the Constitution or laws of the United States, and the decision is in favor of their (its) validity."

Here the act itself is restrictive of jurisdiction, and to conform thereto this court has likewise been. Wherever the Federal question arises on consideration of a State statute, this court has so far as possible left entirely to the courts of last resort in the States the construction of their own laws. That is as it should be, and is in accordance with the jurisdictional act. The construction of such laws is entirely with the State courts. Even the validity of the statute is a question for those courts, unless the validity happens to be drawn in question on grounds of repugnancy to the Constitution or laws of the United States and the decision is in favor of the validity of the State statute.

Where, however, the Federal question arises in reference to the Federal act, the jurisdictional act is broader, covering all cases

"where any title, right, privilege or immunity is claimed under * * * any * * * statute of * * * the United States, and the decision is against the right, title, privilege or immunity specially set up or claimed."

By authorities already referred to, where the decision is against a claim set up to have the Federal statute correctly construed, this court has held that such decision is against a right, title, privilege or immunity specially set up or claimed under the statute. This seems to us necessary, in order to secure uniformity of construction of statutes which are constitutional and valid. Under a different ruling, and the country might at once be confronted with as many constructions of the same Federal statute as we have States in the Union.

3. THE DEFENDANT IN ERROR, HAVING DEPARTED FROM THE SPHERE OF HIS ASSIGNED DUTIES, THE RELATION OF MASTER AND SERVANT WAS THEREBY SUSPENDED, AND THE RECEIVERS OF THE PLAINTIFF IN ERROR THEREFORE OWED HIM NO GREATER DUTY THAN THEY OWED A TRESPASSER OR A BARE LICENSEE.

More or less involved in the *first* two propositions above considered, is the *third*, which asserts that because the defendant in error had deserted his post of duty and gone elsewhere to voluntarily assist the servant of another company to discharge his duties, the relation of master and servant was *thereby suspended*, and consequently the receivers *no longer owed him the duties incident to such relationship*.

If this is a correct proposition of law, then, upon the testimony of the plaintiff in error, it necessarily follows that the defendant in error was *not* injured as the result of the negligence of said receivers. Therefore, the material question, after all, is whether, *upon the law of the case as applicable to the evidence of the plaintiff in error*, the relation of master and servant *was* suspended while the defendant in error, in violation of the rules of the company, *was in the express car*, and if so, whether, for the time being, the duties incident to said relationship were *likewise* suspended.

In support of the affirmative of this proposition, we submit the following authorities, in addition to those already referred to in former parts of this brief.

"It is elementary that the defendant company owed no duty to the plaintiff, if he was not, when injured, engaged in serving it in the line or within the scope of his employment. Although he was in its general service, the defendant could not be liable for injuries received while the plaintiff was engaged in an enterprise foreign to his employment. * * * It (the defendant) was

not negligent if, at the time, and under the circumstances, it owed him no duty."

Olson v. R. R. 76 Minn. 149.

"The general rule undoubtedly is that the master is not liable for injuries to his servant unless the servant was at the time in the performance of some duty for which he was employed."

Stagg v. Tea Co. (Mo.) 69 S. W. 391.

"When the accident happened it clearly appears that the intestate was not engaged in mining, which was his employment; that his proper place was not in the room where he was injured, but on the contrary, he was a volunteer there for his own pleasure or amusement. The intestate not being engaged on his own employment, was in the same position as a visitor to the mine."

Wright v. Rawson, 35 Am. Rep. 275.

"If an employee quits the work assigned him by his employer and voluntarily undertakes to do work about which he has no duties to perform, by virtue of the contractual relation existing between him and his employer, then, while such condition exists, the duty growing out of that relation of using care for his safety, does not rest on the employer. Therefore the rule obtains, that to hold an employer liable as such, for injury resulting from a breach of such duty, it must appear that the employee was, at the time of the injury, acting within the scope of his employment."

So. Ry. v. Guiton (Ga.), 25 So. 34.

"If, at the time when, and the place where, the injury is received are not within the scope of the contract of employment, the relation of master and servant can not be justly said to exist, and no recovery can be had against the defendant in the character and capacity of an employer or master."

Green v. Ry. (Minn.), 88 N. W. 975.

"In going where he did, he not only went entirely out of his way, but was in pursuit of an object relating solely

to his own personal convenience; and while perhaps not in strictness a trespasser, he was at best a mere licensee at sufferance, to whom the defendant at the time owed no duty."

Kennedy v. Chase (Cal.), 52 Pac. 33.

"According to the plaintiff's own testimony, he was injured while at work in a separate and distinct department from the one in which he was employed; and therefore while in doing such work the relation of master and servant did not exist between him and the defendant."

Bryan v. Ry. (Tex.), 90 S. W. 693.

"It must be conceded, as contended by the defendants' counsel, that when the plaintiff is injured in a place where he has no right to be, or if he goes out of his employment for some private purpose and not on his own employer's business, he has no cause of action against his employer. That seems to be the well-settled rule. Dresser's Employers' Liability, Sec. 104."

Mining Co. v. Talley (Ala.), 43 So. 800.

"Where the servant leaves his own work to do something else for which he was not engaged, the duty of the master towards him reaches its vanishing point, as it has been said, at the moment of the transition, and his corresponding liability for resulting injury disappears."

Patterson v. Lumber Co. 145 N. C. p. 44.

"If the plaintiff on Monday, when he was injured in going upon the ice-run and beginning to work there in hoisting up the ice from the water, did this of his own motion, or at the mere request of Knight, without authority from the defendant or from the defendant's superintendent, then he was acting in excess of his duty, beyond the scope of his employment, as a mere volunteer, and can not recover for any injury that resulted from his having undertaken work that he was not employed or expected to do."

Lewis v. Coupe (Mass.), 85 N. E. Rep. 1054.

The principle of the foregoing decisions is tersely and accurately stated in *1 Dresser Employers' Liability*, Sec. 104, as follows:

"When the plaintiff is injured in a place where he has no right to be, or by machinery which the scope of his employment does not require him to use, if he went out of his employment for some private purpose and not on his master's business, he has no cause of action against his employer."

But counsel for the defendant in error contends that the principle laid down by the above authorities is founded upon a rule of *common law* which has no application to the proper interpretation of the Federal act in question, and therefore the refusal of the trial court to give instructions prayed by the plaintiff in error, embodying this principle, does not raise a *Federal question* which may be reviewed in this court.

From this position we dissent, for the reason, as has been hereinbefore stated, that what *was*, or was *not* negligence in this case, within the meaning of the Federal act, depended upon the definition of that word in said act, in the light of its well-known meaning, which has been sanctioned by well-settled judicial decision, based upon the rules of common law; as it must be presumed that the word was used in that sense by the legislative body passing the act.

Kepner v. U. S. 195 U. S. (at p. 124, cited *supra*).

Therefore, what is negligence, as used in the statute in question, is as much a Federal question as the construction of any other portion of the act, though its solution depends upon the application of well-known principles derived from the common law. *To hold otherwise would be to deny to this court the right to interpret the most material provisions of said act, and leave the different State*

courts free to place their own conflicting constructions thereon.

Then if we are correct in this proposition, the trial court surely erred in construing this statute, in refusing to charge the jury as requested by the plaintiff in error, particularly in refusing to give the following instruction (Rec. p. 104) :

" That as the plaintiff admits he was in the express car at the time of his injuries, and as the rules of the receivers of the defendant (of which he admits he had notice) required him to remain in the baggage car when not engaged in flagging the train, the burden is upon the plaintiff to satisfy the jury by the greater weight of the evidence, that when he went into said express car and was injured, he was engaged in the discharge of the duties of his employment, and if he has failed so to satisfy the jury, you will answer the first issue, ' No.' "

This error was not cured by the charge actually given by the court, as follows (p. 105, Rec.) :

" If you find from the evidence, and the greater weight thereof, the burden being upon the plaintiff, that the plaintiff's injury was caused by the defendant's negligence, proximately caused, you should answer the first issue ' Yes; ' if you do not so find, you should answer it ' No.' "

Here it will be seen at a glance that the right of the defendant in error to recover was not at all made to depend upon the question of whether he was or was not injured while employed by the defendant in interstate commerce, but solely upon the question whether he was injured as the result of the collision of the trains, which it was admitted was due to the negligence of the servants of the receivers.

But the defendant in error contends that these prayers for instruction should have been pointed to the issue of *contributory negligence*, instead of to the issue as to *neg-*

ligence, and claims that his alleged conduct in leaving his post of duty, in violation of the rules of his employers, bore upon the former, rather than the latter issue. This contention, we submit, is erroneous, as it is a well established principle of law that if there is no negligence in the *first* instance, there can be no contributory negligence in the *second*, and certainly if, according to the authorities above cited, the relation of master and servant is temporarily suspended, while the latter is acting outside of the scope of his employment, and the master owes the servant none of the duties arising out of said relationship, then *there was no negligence in this case*, if the servant was, in fact, *wrongfully in the express car when injured, in violation of the rules of his employer.*

The affirmative of this proposition is abundantly supported by the authorities. In discussing the subject, Judge Elliott says:

"Some of the cases rest the rule that the master is not liable for injuries to his servant, where the servant voluntarily goes into a place of danger into which his contract of service does not require him to go, upon the ground of contributory negligence; but it seems to us that the rule rests upon the principle that the master's specific duty does not embrace places into which the employee goes solely for his own convenience."

3 Elliott on Railroads, Sec. 1303.

Even stronger still is the language used by *Mr. Labatt*, in pointing out the error referred to by Judge Elliott, where he says:

"In several cases involving circumstances similar to those reviewed in the last two sections, the courts, instead of making the right of recovery turn upon the question whether the defendant did or did not owe any duties as master to the injured person, have determined that right with reference to the conception that the injured person was or was not guilty of contributory negligence in under-

taking the work upon which he was engaged at the time of the accident.

"Some of the decisions rendered upon this basis would seem to embody the doctrine that the culpability of the servant becomes an inference of law as soon as it has been shown that he was not authorized to do the work on which he was engaged when the injury was received. It may be conceded that such an inference is proper, where the departure from the ordinary course of his employment exposed the servant to obvious peril of an abnormal nature, or where that departure constituted an infraction of specific prohibitory directions. But, as a matter of ultimate analysis, it seems scarcely permissible to say that, without regard to the particular circumstances involved, negligence must always be a legal conclusion from evidence which shows that at the time of the accident the servant was engaged upon an unauthorized piece of work. *The practitioner would at all events do wisely to avoid this possibly disputable issue, and found his plea upon the more certain ground furnished by the doctrine that in the case supposed the master does not, as a master, owe the servant any duties.*"

2 Labatt, Master and Servant, Sec. 635.

Here it will be seen that this eminently fair author clearly draws the distinction herein contended for by the plaintiff in error in holding that the question of the conduct of the defendant in error, in going into the express car in violation of the known rules of the company, should be considered in passing upon the question of the *negligence of the plaintiff in error* in the first instance, and not upon that of the *contributory negligence of the defendant in error in the second*.

But the action of the trial court in attempting to apply this principle to the issue of contributory negligence was equally prejudicial to the rights of the plaintiff in error, in that, in charging the jury upon the issue (Rec. p. 80, between *c* and *d*) the court made the question of contributory negligence to ultimately turn upon whether the act

of the defendant in error in "going into the express car was such an act on his part that a reasonably prudent man would not have done under the circumstances of the situation." Whereas, it is perfectly manifest that if he went into the express car *in violation of the rules of his employers*, to assist the express agent to do his work, then the "rule of the prudent man" had no place in enabling the jury to pass upon the issue involved.

So that, *under the instructions which the court gave to the jury*, their answers to the issues settled *no disputed fact in the case*, as under the charge of the court they might well have answered the first issue "Yes," and the second issue "No," and at the same time have found as a fact, *as claimed by the plaintiff in error*, that the defendant in error *had abandoned his post of duty in the baggage car and in violation of the rules of his employers gone into the express car, where he was engaged in assisting the express messenger at the time of his injuries*. We therefore make the point that *under the charge of the court, as given to the jury*, their verdict does not establish a single *controverted fact in the case*, and particularly does it not negative the theory of the plaintiff in error that *at the time of his injuries the defendant in error had actually abandoned his post of duty and in violation of the rules of his employers gone into the express car for the purposes above pointed out*.

The Decision of the Supreme Court of North Carolina was Based upon an Erroneous Conception of the Testimony as the Same Appears in the Record.

The opinion is short, scarcely a page. Following the statement that

"the defendant contends that under the Federal Employers' Liability Act the plaintiff is not entitled to recover,"

for the three reasons we have been discussing, is what purports to be a statement of some of the facts of the case.

The Supreme Court of North Carolina is an appellate court, and has jurisdiction only to review *questions of law*. In a case tried before a jury, and appealed to it, that court has no jurisdiction whatever to determine what the facts were in the case. We appreciate the weight that would naturally be given to a statement from a source so high, as to what the facts were, and where the facts did not appear for themselves in the record which was before this court, we apprehend that from such a source a statement of the facts might even be accepted as conclusive. The facts of this case, however, are here and part of the record for review by this court.

The Supreme Court of North Carolina had no jurisdiction to make the finding of any fact, and neither this court, nor the plaintiff in error here, is bound by its statement of what any fact was upon which to predicate its opinion. This case comes here on writ of error, in a very different way, than would a case come on appeal from a court authorized to find the facts as well as the law. For instance, we will say, the Court of Claims, which is authorized to find the facts as well as the law, and which findings of fact are final on a review here. No such status exists, as to a case brought to this court under the jurisdictional act, from a decision by the Supreme Court of North Carolina. That court had only jurisdiction to pass on the law of the case. If to determine whether the Supreme Court of North Carolina denied to your plaintiff in error the right of having a Federal statute construed correctly it becomes necessary to consider some of the evidence which was before that Supreme Court, such evidence must be considered as it is found in the record, and in the place of such consideration there can not be substituted an un-

warranted statement by the Supreme Court of North Carolina of what certain facts were,—a statement which is binding upon no one.

Neither before the Supreme Court of North Carolina, nor before this court, is there a question of the determination of what were the facts of this case. But the question is, whether instructions upon a construction of a statute of the United States were denied, which would lead, or on possible findings of fact from the evidence might lead, to a judgment in favor of the plaintiff in error here. (*St. L. & I. M. R. R. Co. v. Taylor*, 210 U. S. 281.)

Without entering upon a controversy as to the truth of evidence, we are constrained to show that there was evidence on which, in its aspect most favorable to us, we were entitled to a construction of the statute as applicable thereto.

(1). It is stated in the opinion of the North Carolina Supreme Court that:

“The uncontested facts are that the plaintiff was baggage master and flagman, *and was so employed at the time of the injury.*”

(p. 91, Rec.)

Whereas, the defendant offered evidence which was admitted, that the plaintiff *was not at the time of the injury* employed as baggage master and flagman, or in any other capacity by the carrier he was serving (Rec. p. 34) but on the contrary, had abandoned his post of duty in the baggage car, and in violation of the known rules of the receivers (Rec. p. 46), had been in the express car for some half hour prior to the collision, engaged in assisting the express messenger in the discharge of his duties (Rec. p. 34).

We can conceive of no possible way whereby the court

arrived at the conclusion that the fact was uncontroverted that the plaintiff was baggage master and flagman, *and was so employed at the time of the injury*, save by a construction of the act by the court at variance with our view of the law governing this case. To state it in another way, the court is giving its views of the legal effect of the evidence showing that the baggage master had abandoned his place of duty in the baggage car, and in violation of known rules of the receivers had for some half hour before the collision been in the express car, engaged in assisting the express messenger.

In other words, we can not conceive that the Supreme Court of North Carolina means that it did not have evidence before it that the defendant in error knew of the rules of the road, or that he was not, at the time he was injured, in the express car assisting the express messenger and not in the baggage car, where the rules of which he knew required him to be. But, on the other hand, that the court considered that his being there under those circumstances was, under the court's construction of the law, immaterial as bearing upon the provision of the law, that he must, at the time of his injury, have been employed by the carrier in interstate commerce.

While in what follows the court makes certain statements as facts, what is quoted above is the only thing referred to by the court as uncontroverted fact.

(2.) It is also stated that

"But the fact is that his duties called him to the express car, as well as to the baggage car."

(p. 91, Rec.)

Whereas, the plaintiff in error offered evidence which was admitted, not only that the defendant in error *had no duties to perform in the express car on the night of the injury* (testimony of Rowe, p. 34; Wren, p. 45,

Rec.), but on the contrary, that *he was there in express violation of the known rules of the company* (Rec. p. 46), and was actually engaged in assisting the express messenger in the discharge of his duties, when injured (Rec. p. 34).

(3.) It is also stated that

"There is no evidence that being in the express car in any wise enhanced his (defendant in error's) risk, or contributed to his injury,"

and that

"In fact, the probabilities are that had he remained in the baggage car he would have been more seriously injured, or possibly killed by the trunks falling upon him. The evidence is that the baggage car was more seriously damaged than the express car."

(p. 91, Rec.)

Whereas, the plaintiff in error offered evidence which was admitted and uncontradicted, to the effect that the express car was completely demolished, having been telescoped by the baggage car, while the baggage car was but little injured, and that *the chances of being injured in the express car were much greater than in the baggage car* (Rec. pp. 39-43).

The plaintiff in error proved by eight uncontradicted witnesses, who viewed the wreck immediately after it occurred, that the express car was completely demolished, while the baggage car, though turned over down the embankment, was practically intact, with the exception of the front end, which had telescoped the express car, and that the baggage in the car was taken out but little damaged (Rec., p. 39), and that *the passengers in the rear end of the said baggage car escaped practically unhurt* (Rec. p. 58).

(4.) It is also stated that

"The plaintiff's going into the express car was not an unlawful act, and under the circumstances could not have affected his employment, or the responsibilities of the company."

(p. 91, Rec.)

Whereas, the plaintiff in error offered evidence which showed that the rules of the receivers, known to the defendant in error, required him to remain in the baggage car when not discharging the duties of a flagman or brakeman (p. 46, Rec.) ; and that he had gone into the express car in violation of these rules to assist the express messenger to discharge his duties (Rec. p. 34).

(5.) It is also further stated that plaintiff in error's "duty lay in the express car as well as in the baggage car, for in the former the through baggage, which was part of his charge, was carried, and though there was none at that time (in the express car) he might prepare to receive such at Sanford."

(p. 91, Rec.)

Whereas, the uncontradicted evidence of both parties showed that the defendant in error *did not go into the express car for the purpose of receiving or handling through baggage* (*Duvall*, Rec. p. 14; *Rowe*, p. 34); and the evidence of the plaintiff in error showed not only that the defendant in error was in said car to assist the express messenger, but also that the railroad company had no right to carry baggage of any sort in said express car when there was room for it in the baggage car (Rec. p. 47), as was the case on the night of the collision (*Duvall*, p. 17; *Cox*, p. 48, Rec.).

This erroneous conception of the evidence may serve to show how the Supreme Court of North Carolina reached an erroneous decision upon the law in the case. But where the record itself shows, as it does here, that there was evidence which, under instructions constru-

ing the statute correctly, would, or might, lead on a finding of fact, to a judgment in plaintiff in error's favor, the statement by the Chief Justice of certain facts as being established, from which facts his decision would logically follow, is in no wise binding upon this court.

The Defendant in Error's Citations.

We have examined the cases cited by the defendant in error, and have briefly noted points of difference between them and the case at bar, which we herewith give:

C. & O. R. R. v. McDonald, 214 U. S. 192-193 (brief, deft. in error, p. 15), is not like the case at bar. It was a common land action brought in the State court. There was no motion made in apt time to remove to the United States court, and *Mr. Justice Day* says:

"Nor is there anything in the record to indicate that the alleged error was brought to the attention of the Court of Appeals."

Maxwell v. Newbold, 18 How. 511, cited by the defendant in error (his brief, p. 16) is not similar to this case. The *Maxwell v. Newbold* case was an action arising altogether out of State (Michigan) statutory liens, and Chief Justice Taney, delivering the opinion of the court, very properly says:

"The questions raised and decided in the State Circuit Court point altogether for their solution to the laws of the State."

Michigan Sugar Co. v. Dix, 185 U. S. 112, is his next case, on page 16 of his brief. That case is not applicable to the case under consideration. The Sugar Company applied for a mandamus against the Auditor General of Michigan, and Chief Justice Fuller says, p. 113:

"The petition nowhere sets up that the State of Mich-

igan passed any law impairing the obligation of a contract with the relator, nor was any issue in relation thereto raised in the record."

Oxley Store Co. v. Butler Co. 166 U. S. 648 (on p. 16), has no application. That was a case involving the title to certain lands in Butler County, Mo., and Mr. Justice Harlan cites the case of *Maxwell v. Newbold*, *supra*, quoting from it what we have given.

Southern Railway v. Carson, 194 U. S. 134 (p. 16, defendant's brief), does not apply to the case under consideration, for that the plaintiff brought his action in the State court as an ordinary action of negligence, and not under the Federal statute.

Spies v. Illinois, 123 U. S. 131 (defendant's brief, p. 16), is meant, no doubt, for the celebrated case of August Spies and others, the bomb throwers, in Haymarket, Chicago. In that case the defendants were tried in the State courts of Illinois, for murder, and applied to the Supreme Court for a writ of error, and the writ was refused. Thereupon, application was made to Mr. Justice Harlan for the writ, and on account of its importance, at his suggestion, was made in open court. That motion was heard in open court and the petition for the writ was dismissed. We have examined the case with care, and failed to find any analogy between that case and the one we are considering.

A. J. Kizer v. Texas Railroad, 179 U. S. 199 (defendant in error's brief, p. 16), is not at all like this case. In the above case the plaintiff brought his action, alleging a contract with the railroad for the carriage of lumber. The defendant pleaded that the contract was illegal, and in contravention of the interstate commerce act; that is to say, the defendant pleaded a Federal statute, and Kizer's writ of error was dismissed for the reason that it

was the railroad, defendant, and not the plaintiff, Kizer, who was seeking a construction of the Federal act.

Warfield v. Chafflin, 91 U. S. 690 (defendant in error's brief, p. 16,), has not the slightest application to this case. This action was brought in a district court in and for the Parish of Ouachita in Louisiana, on a note of hand, and here is a syllabus of the case:

"The petition for the allowance of the writ of error in the court is no part of the record of the State court below. This court acts only on that record, and where that does not show that any Federal question was either presented by the pleadings or upon the trial in the State court, this court has no jurisdiction."

And the opinion of the court goes on to state that the first time when any question of construction of the Federal statute was presented was when the petition for the writ of error was allowed.

Harrison v. Morton, 171 U. S. 38 (defendant in error's brief, p. 17), is not like this case. The plaintiff Harrison brought his action in the State court to recover damages for the breach of a contract for the sale of certain patent rights, and the defendant, among other defenses, raised Federal questions which were decided in its favor. It is to be noted that the *plaintiff who came to this court by a writ of error did not invoke the protection of the Federal act in the court below*. The writ was dismissed, the court saying that jurisdiction could not be maintained here.

"Unless it appeared affirmatively not only that a Federal question was presented for decision by the State court * * * and also that it was actually decided *adversely* to the party claiming a right under it," etc., etc.

(The writ did not place the above errors in italics.)

We have examined the following cases, cited by the

defendant in error in his brief, pp. 17 and 18, *and in not one of them was the action brought in the State court upon a Federal statute.*

- Eustis v. Bowles*, 150 U. S. 361.
Price v. Summersett Railway, 171 U. S. 641.
Mo. Pacific Ry. v. Fitzgerald, 160 U. S. 566.
De Suassure v. Gaillard, 127 U. S. 488.
Detroit Railroad v. Guthard, 114 U. S. 133.
Bowling v. Levener, 91 U. S. 594.
Brown v. Atwell, 92 U. S. 327.
Louisiana v. Louisiana, 98 U. S. 140.
Decatur Bank v. St. Louis Bank, 21 Wall. 194.
Endowment Assn. v. Kansas, 120 U. S. 103.

This court declared the Employers' Liability Act of 1906 unconstitutional in the *Employers' Liability Cases*, 207 U. S. 463; and Congress passed the act of 1908 to cure the defects found by this court to exist in the act of 1906.

The constitutionality of the act of 1908 has not yet been passed upon by this court. The validity of the act comes before the court at this term in another case, the *Northern Pacific Ry. Co. v. Babcock, Admr.*, No. 700, appealed from the United States Circuit Court of the District of Minnesota on demurrer.

In view of the fact that this act of Congress has not as yet been considered by this court, and also of the importance of the questions here involved, one of which is, who, under the terms of the act, is an employee "suffering injury while he is employed by such carrier in such commerce,"

We respectfully submit that it would be proper and appropriate to allow the jurisdictional question here raised

by the motion of the defendant in error to dismiss to await consideration until this case can be heard upon its merits, when both questions may be considered together and oral argument had.

Respectfully submitted,

HILARY A. HERBERT,

BENJAMIN MICOU,

RICHARD P. WHITELEY,

WALTER H. NEAL,

E. T. CANSLER,

Counsel for Plaintiff in Error.

IN THE
Supreme Court of the United States.

October Term, 1911.

SEABOARD AIR LINE RAILWAY,
Plaintiff in Error, }
v.
ERNEST DUVALL,
Defendant in Error. } No. 304.

**BRIEF OF PLAINTIFF IN ERROR RELATING
TO ASSIGNMENT OF ERROR No. 6, AS
SHOWN ON PAGES 80 AND 105 OF THE
RECORD.**

To discuss this understandingly we will have to refer to the course of the trial and the state of the evidence when the cause came to be submitted to the jury. This is done, *not to re-try the question of fact, which we may not do*, but to see whether error was committed in what the judge said to the jury.

Statement of Facts.

1. The plaintiff in error is engaged in interstate commerce, running its trains from Virginia through North Carolina, and to points beyond North Carolina into other States.

2. The defendant in error was in the employment of the plaintiff in error in the capacity of baggage-master on the 13th day of March, 1908.

3. The rules of the plaintiff in error required that baggage-masters should remain in the baggage-car while on duty, except when required to take the place of the brakeman. This rule reads as follows:

No. 664: "They must report for duty at the appointed time; remain in baggage cars while on duty, except when required to take the place of the brakeman; be civil and obliging to passengers, and not permit any one to ride in the baggage car except those whose duties require it." (See page 46 of the record.)

4. A copy of that rule was in the possession of the defendant in error at the time he received his injury. The defendant in error testified, "I then had a book of the rules of the Company in my possession. Those rules correctly set forth what my duties were." (See printed record, page 18.)

5. On the 13th of March, 1908, two trains of the plaintiff in error, running on the same track and in opposite directions, ran together, having what is commonly called a head-on collision.

6. There is absolutely no conflict or dispute in the evidence to the effect that at the time of the collision the defendant in error was not in the baggage car, but he was in the express car.

7. The defendant was injured in the collision.

On the foregoing facts there was no dispute.

8. There was some conflicting evidence in the trial in the State Court on the point as to why the defendant in error had left his post of duty, where the rule of his employer required him to be, to-wit, in the baggage car.

The railway, plaintiff in error, contended that Duvall, the defendant in error, was in the express car, not under an order from the conductor, but by an invitation from the express messenger, assisting the latter in checking up the express matter, and that the express messenger,

Duvall, the defendant in error, and Cox, the conductor, were in the express car drinking just a few minutes prior to the wreck. (See printed record, page 34.)

W. P. Rowe, the express messenger, witness for the plaintiff in error (record, p. 34), testified as follows:

"I said to him, I have a heavy run and am not yet through work. I asked him if he would agree to come in and help me soon after leaving Raleigh, and he agreed to do so and did come in. It was not long before the wreck that Cox, the conductor, came into my car, about ten minutes I would say. He remained there until the wreck occurred. I did not send for him that night. Did not tell Mr. Duvall to tell him to come in there. After Mr. Cox and Duvall came in, Mr. Duvall was helping me for a short while—four or five minutes—when Mr. Cox came in and we three took a drink of whiskey."

This same witness Rowe also related a conversation he had with the conductor, Cox, in the presence of Duvall, when they were in the hospital, at which time the conductor was endeavoring to get up some excuse to account for the presence of himself and the baggage-master in the express car at the time of the wreck and suggested that it could be understood that they were in the express car because of a suspected robbery of the express matter. (This evidence may be found on page 35 of the record.)

The defendant in error contended that as baggage-master he was subject to the orders of the conductor, and that he went into the express car under the directions of the conductor.

The defendant in error testified that he went into the express car with the conductor and at his request. This will be found on page 14 of the printed record, in which the defendant in error testified as follows:

"Mr. Rowe (the express messenger) asked where the conductor was, I said, 'In train collecting tickets.' He said, 'Tell him to come up to my car,' and I said, 'All right.' When the conductor came to my car I told him what the messenger said and he said, 'All right, let's go see what he wants.'"

9. The plaintiff in error, railway, offered evidence tending to show that if the defendant in error had remained at his post of duty in the baggage car, where the rules of the company required him to be, he would not have been injured.

The plaintiff in error introduced and examined eight witnesses who viewed the wreck immediately after it took place, whose evidence tended to prove that the express car was completely demolished, while the baggage car was practically intact, with the exception of the front end, which had telescoped the express car, and that the baggage was taken out, but little damaged, and the passengers in the rear end of the baggage car (one end of it was used for passengers) escaped practically unhurt.

In the light of the above evidence we will discuss the error involved in the said sixth assignment of error found on pages 80 and 105 of the record.

We most respectfully submit:

1. That the rule of the plaintiff in error requiring the defendant in error, who was the baggage-master, to remain in his car, was a reasonable one.

2. That if the defendant in error was injured because of the violation of that rule, he was guilty of contributory negligence.

3. That if the defendant in error was guilty of contributory negligence, then under the Federal Employers' Liability Act, by its very terms, it was the duty of the jury to "Diminish the damages in proportion to the

amount of negligence attributable to the defendant in error."

4. That the plaintiff in error was entitled to a correct interpretation of the law relating to contributory negligence in order that the damages might be diminished if the defendant in error was guilty of contributory negligence.

The issues submitted to the jury with the answers are as follows:

(A) Was the plaintiff injured by the negligence of the defendant? Answer. Yes.

(B) Was the plaintiff's injury caused by his contributory negligence? Answer. No.

(C) What damages is the plaintiff entitled to recover? Answer. Thirty thousand (30,000) dollars.

Assignment of error 6, pages 80 and 105. The court on the issue of contributory negligence charged the jury:

"If you find from the evidence that the plaintiff had no right to go into the express car, that he was not where he should have been, and you further find that he would not have been injured but for his going into the express car, *and that his going into the express car was such an act on his part that a reasonably prudent man ordinarily would not have done, under the circumstances of the situation,* then he would be guilty of contributory negligence and it would be your duty to answer the second issue, 'Yes.' If you do not so find it would be your duty to answer the second issue, 'No.' "

The plaintiff in error complains of the above portion of the charge which has been italicized.

Now then, noting the conflict in the evidence as before stated as to whether the defendant in error had abandoned his post of duty and thereby became guilty of contributory

negligence, the trial judge in the State court presented to the jury the issue of contributory negligence arising out of that conflict as to whether Duvall was rightfully in the express car at the time of the impact of the two trains, but he added these words in presenting the issue: "*And that his going into the express car was such an act on his part that a reasonably prudent man would not have done under the circumstances of the situation.*"

The foregoing italicized words show clear and palpable error. It needs no argument. The rule of the prudent person as between the master and servant can not possibly arise if it is made to appear that the injury proceeded from the violation of a rule made by the master. If that is not true then a servant may at any time substitute his judgment for that of the master.

The following illustration will show the utter absurdity of applying the rule of the prudent person to an issue of contributory negligence.

A is a rear brakeman on a train engaged in interstate commerce. The railway promulgates a rule to the effect that "rear brakemen must remain at their posts of duty at the rear end of the train." *A* concludes that he will go up and ride on the engine. His work does not carry him there. While so riding on the locomotive there is a head-on collision and he is seriously injured. He then brings his suit under the Federal Employers' Liability Act in the State court. The head-on collision presumes negligence on the part of the railway. The railway on the trial of the cause introduces evidence tending to show that if *A* had not violated the rule and had remained at the rear end of the train he would have suffered no damage. The railway can not have a diminution of the verdict unless it be found by the jury that the injured party was guilty of contributory negligence. So then the judge proceeds to charge the jury, as was done in this case, that

there can be no contributory negligence unless *A* acted imprudently in violating the rule.

In the proper construction of the Federal Employers' Liability Act the plaintiff in error had the right to have the question of contributory negligence submitted to the jury without the qualification of the rule of the prudent person being included in the instruction.

Then if the jury should find that there was no contributory negligence the plaintiff in error will be bound by what the jury may find, but on the other hand if the defendant in error was guilty of contributory negligence then the amount of damages under the Federal Act would be "diminished by the jury in proportion to the amount of negligence attributable to such employee."

The plaintiff in error relies with very great confidence on the case of *St. Louis and I. M. Railway v. Taylor*, 210 U. S. p. 293, from which we quote as follows:

"Where a party to litigation in a State court insists by way of *objection to*, or requests for instructions, upon a construction of a statute of the United States, which will lead to, or, on possible findings of facts from the evidence may lead to a judgment in his favor, and his claim in this respect being duly set up, is denied by the highest courts of the State, then the question thus raised may be reviewed by this court. The plain reason is that he has claimed in the State court a right or immunity under the laws of the United States, and it has been denied to him."

In that case Taylor brought his action in the State court under the "Safety Appliance Act." In this case Duvall brought his action in the State court under the Federal Employers' Liability Act. In Taylor's case the trial judge in the State court gave certain instructions to the jury, to which the plaintiff in error took exception and this court held that the exception so lodged was sub-

ject to review. In this case the judge in the State court gave certain instructions to the jury to which the plaintiff in error in apt time excepted, and we ask this court to follow the rule laid down in Taylor's case.

We desire only to add that the case of *St. Louis Iron Mountain v. Railway* case, *supra*, decided in May, 1908, has been approved by the court in several cases, particularly in *Cody v. Arts*, 213 U. S. page 238, in which Mr. Justice Day, having the Bankrupt Act under consideration, has this to say:

"A construction of the act is insisted upon by the appellant, which would defeat the lien. On the other hand, the construction contended for by the appellee would give the lien validity. In such a case had the suit been in the State court, it would have been brought here for review under section 709 of the Revised Statutes.

We most respectfully insist that if in the trial of this case in the State court the judge had not instructed the jury on the issue of contributory negligence to the effect that although there was a reasonable rule, and although the defendant in error violated that rule with the resulting effect of being injured in consequence of that violation, still there would be no contributory negligence if a prudent person would have violated the rule, then we insist that the jury on the conflict of the evidence, would have answered the second, "Yes," and thereupon the defendant's negligence would have been charged against him in diminution of the thirty thousand dollar recovery.

We therefore insist that the court ought to award a new trial for the error herein pointed out.

Respectfully submitted,

BENJAMIN MICOU,
WALTER H. NEAL,
Counsel for plaintiff in error.

Office Supreme Court, U. S.
FILED.

JAN 5 1912

JAMES H. MCKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

October Term, 1911.

SEABOARD AIR LINE RAILWAY, }
Plaintiff in Error, }
v. } No. 304.
ERNEST DUVALL, }
Defendant in Error.

*Brief of Plaintiff in Error on the Motion of
Defendant in Error of January 8, 1912,
to Order this Case Transferred to the Sum-
mary Docket.*

HILARY A. HERBERT,
BENJAMIN MICOU,
RICHARD P. WHITELEY,
WALTER H. NEAL,
E. T. CANSLER,
Counsel for Plaintiff in Error.



IN THE
Supreme Court of the United States.
October Term, 1911.

SEABOARD AIR LINE RAILWAY, }
 Plaintiff in Error, }
 v. } No. 304.
ERNEST DUVALL, }
 Defendant in Error.

***Brief of Plaintiff in Error on the Motion of
Defendant in Error of January 8, 1912, to
Order this Case Transferred to the Sum-
mary Docket.***

Present Status of the Case.

The record in this case was filed in the Supreme Court of the United States May 27, 1910.

October 11, 1910, a motion was made in this court by the defendant in error to dismiss the writ of error, or affirm the decision of the Supreme Court of North Carolina. Briefs were filed from both sides, and after consideration, this court (October 17, 1910) made the following order:

"Motion postponed to hearing on merits."

The defendant in error has therefore had his day in court.

October 23, 1911, this court amended Sec. 5 of Rule 6, and the defendant in error now submits again to this

court the formal motion to dismiss already passed on October 17, 1910, and further moves that the cause be transferred to the summary docket. As grounds for his motion, he alleges that it is manifest the writ of error was taken for delay only, that the questions on which the decision of the cause depends are so frivolous as not to need further argument, and that the cause is of such character as not to justify extended argument.

A brief accompanies the motion, of nearly seventy pages. In it nothing new is presented or argued to sustain the grounds upon which it is asked that this case be transferred to the summary docket. It is a restatement only at greater length of what was presented to the court in support of the motion to dismiss, made in October, 1910. Seventy pages of reargument is the *only earnest* counsel offers this court of his faith in the contention that the writ was taken for delay only, that the case does not justify extended argument, and that the questions involved are frivolous.

Sec. 5, Rule 6, as amended, does not authorize a motion to order a cause transferred to the summary docket. It states the court will receive a motion to affirm; and it is then provided that upon consideration of this motion the court, though it refuses the motion, may nevertheless order the cause transferred for hearing to the summary docket, if a conclusion is arrived at that the case is of a character not to justify extended argument.

It was never the purpose of this rule to provide for REHEARINGS of motions to dismiss after such motions had once been considered, and the court had decided what course to pursue with the cause and had, as in this case, entered an order setting forth its decision of that question.

We call attention to the fact that the court, since it entered the order postponing the motion to dismiss to a

hearing on the merits, has amended its rules so as to reduce the usual time for oral argument from two hours to one hour and a half.

Statement.

This appeal was not taken for the purpose of delay.

The plain and indisputable facts are:

The defendant in error brought his suit in the State court of North Carolina on this Federal Statute—the Federal Employers' Liability Act of April 22, 1908.

Under the common law and statute law of North Carolina a complainant could not recover for the railroad's negligence where he himself was guilty of contributory negligence.

Under the Federal Employers' Liability Act, where the road is engaged in interstate commerce and the plaintiff is employed by the road in such commerce and is injured during such employment, he can have a recovery though his own negligence contributed to the injury.

The question of contributory negligence on the part of plaintiff was involved, and the defendant in error invoked in the State courts, as he had the right to do, the aid of this Federal Statute.

This statute increased the liability of the employer to the employee and therefore the plaintiff in error was entitled to a strict construction of it.

In the trial court and on appeal to the Supreme Court of North Carolina we contended that the statute be construed correctly. This much, at least, we were entitled to.

We did this in the proper manner and at the proper time and the construction we sought was denied.

This was the denial of a right, under a Federal Statute, by the highest court of the State, and under Sec. 709, U. S. Revised Statutes, entitles us to come here.

Therefore we applied for the writ of error.

The defendant in error invoked the aid of the Federal Act in the State court of North Carolina, recovered a verdict for thirty thousand dollars, and secured an affirmation in the Supreme Court of the decision in the trial court.

He moved this court to dismiss for want of jurisdiction and now renews that motion, and solemnly contends that the case was never tried under the Federal Statute, and that no federal question was ever raised or considered in the State court.

The contention is ASTOUNDING
in view of the following:

The same counsel in the brief before the Supreme Court of North Carolina, a copy of which is filed here, states (p. 4) :

"This cause was tried under the Federal Employers' Liability Act, passed by the Congress of the United States on April 22, 1908."

Furthermore, on page 12 of the brief, he filed in this court on his original motion to dismiss or affirm, he admits

"Full faith, credit and validity was given to the Employers' Liability Act of 1908 in so far as the same attached or applied to this case in the trial court."

He wrote this as part of his discussion of the second ground for his original motion.

That ground was—

"2. No right, privilege or immunity was specially set up or claimed in either the trial court or in the Supreme Court of North Carolina."

Surely the ground beneath him is shifty!

The first ground of his original motion was:

" 1. The Employers' Liability Act of 1908 grants no right, privilege or immunity to the plaintiff in error."

Now on page 8 of his second brief here, he states:

1. That there is no allegation in the complaint which brings this case under the Federal Employers' Liability Act.

2. That there is no allegation in the answer which raises any question under the Federal Employers' Liability Act.

3. That there was no allegation in the answer, nor was there any issue submitted, or sought to be submitted, by the plaintiff in error, raising any question under the Federal Employers' Liability Act.

4. That there was no prayer for instructions which in any way referred to the Federal Employers' Liability Act.

5. That the complaint stated a good cause of action in respect to the occurrence of the injury in intra-state traffic under the common and statute laws of the State of North Carolina.

6. That no construction of the Federal Employers' Liability Act was sought in the trial court.

These contentions each and every one are absolutely refuted by the record. This we will now show.

The Action was Instituted by Defendant in Error Against Plaintiff in Error Under the Federal Employers' Liability Act of 1908.

The complaint alleges the operation by the defendant of a railroad as a common carrier. That it was so operating a line from a point in one State to points in another State and beyond (Sec. 1 of complaint, p. 2, Rec.).

That the plaintiff was employed as baggage-master and

flagman on one of defendant's trains, which was being operated from Portsmouth, Va., to Moneure, N. C., and points beyond, and was in and upon said passenger train in the discharge of his duty as a baggage-master and flagman at the time he was injured. That the injury was occasioned by the negligence of the defendant (pp. 2-3, rec.; pp. 6-8 of our original brief).

These facts brought him under the statute and were alleged in accordance with the best recognized rules for pleading such facts (pp. 8-12 of our original brief). For a full discussion of this contention and citations to the authorities, see pages 4-12 of our original brief.

**The Case was tried by the Trial Court of
North Carolina under this
Federal Statute.**

We have already seen that the plaintiff stated a cause of action under the statute. Suing under the statute gave him an opportunity to recover which he would not otherwise have had, for the reason already stated, that the question of his contributory negligence was directly involved, and under the common law and the law in force in North Carolina if the railroad was guilty of negligence and the injured party was guilty of contributory negligence there could be no recovery, but if the plaintiff was an employee and was injured under the circumstances provided for in the Federal Employers' Liability Act he could by suing under that act recover though guilty of contributory negligence, the amount of his recovery to be diminished by the jury in proportion to the amount of negligence attributable to the employee.

Sec. 1 of the statute provides that the person who may recover must be an employee engaged in interstate commerce; must himself be employed by such carrier in such

commerce, and must suffer the injury sued for while so employed (Sec. 1 of the Act, p. 5 of our original brief).

By Sec. 2 (p. 10, rec.) plaintiff in error's answer denied that the plaintiff was at the time of the injury in the employ of the defendant as baggage-master and flag-man, and in the discharge of his duties as such on said train.

Sec. 3 (p. 10, rec.) admitted the collision referred to in the complaint, in which collision plaintiff was injured, and that at the time of the collision the plaintiff was riding by permission of the express messenger in the express car.

Sec. 6 (p. 10, rec.) denied that the wreck was caused by the gross negligence of the defendants, but admits it was due to the carelessness of one or more of its employees.

Defendant further pleaded (pp. 10-11 of the record) that if plaintiff was injured as the result of the negligence of the defendant, which it denies, that he contributed to his own injury in that he was in direct violation of rules of the defendant then in force and known to him, setting this out in detail. For a fuller discussion of this, see pp. 13-14 of our original brief.

Evidence was offered and admitted to establish the contention of the plaintiff in error on the issues joined by the pleadings; and the court submitted three issues of fact to the jury for its determination:

1. Was the plaintiff injured by the negligence of the defendant?
2. Was the plaintiff's injury caused by contributory negligence?
3. What damage is plaintiff entitled to recover? (p. 11, rec.)

As we have already stated, under the common law and

State law of North Carolina, contributory negligence of the plaintiff would preclude recovery. Instead of giving a charge upon this subject which would be applicable in a suit at common law, or under the State law, the trial judge, without exception from either side, charged the jury:

"If you answer the second issue, yes (the second issue was whether the plaintiff was guilty of contributory negligence) then on the question of damages the court charges you that in an action like the one being tried, if the jury shall find from the evidence that the plaintiff, an employee of the defendant company, was guilty of contributory negligence, that is, that he contributed to his own injury, such negligence would not bar a recovery, if the defendant was guilty of negligence also, but the damages which the jury shall under the evidence assess to the plaintiff shall be diminished in proportion to the amount of negligence attributable to the plaintiff."

This charge would not find a place in an action under the North Carolina statute.

This statute is quoted page 10 of the first brief of the defendant in error.

The charge finds a place though in a suit under the Federal Employers' Liability Act and is an application of the provision of Sec. 3 of the Act in almost the verbatim language of the section. Under this act the plaintiff was not entitled to recovery unless the defendant was at the time of the injury engaged in interstate commerce and unless the plaintiff suffered the injury

"while he was employed by such carrier in such commerce."

And

"unless the injury resulted in whole or in part from the negligence of some of the officers, agents or employees of such carrier."

If these conditions all obtained, and it was shown that the plaintiff was guilty of contributory negligence, then he was entitled to damages, but to be diminished by the jury in proportion to the amount of negligence attributable to him.

What has been here cited undoubtedly shows that the cause was tried in the trial court under the Federal Employers' Liability Act.

In corroboration of this we would say that after disagreement of counsel the trial judge settled what the record should be that should go to the Supreme Court of North Carolina on appeal, and under the heading "Cause of Appeal" uses this language:

"This is a civil action instituted by plaintiff and tried under the Employers' Liability Act, passed by the Congress of the United States on the 22d day of April, 1908, to recover damages for personal injuries sustained by him on the 13th day of March, 1909, as the result of a collision of the passenger train upon which he alleges he was acting as baggage-master, and a freight train, near Sanford, N. C."

(p. 13, rec.)

This subject is discussed, pages 12-16 of our original brief.

The pleadings show that the plaintiff brought his action under a federal statute and while we believe that what we have cited shows beyond question that the case was tried under the Federal Act, we further assert that—

IT MUST HAVE BEEN TRIED UNDER THAT ACT AND COULD NOT BE TRIED UNDER THE STATE LAW, AS THE FEDERAL ACT WHEN INVOKED SUPERSEDES THE LOCAL STATE LAWS, BOTH COMMON AND STATUTORY.

A full discussion, with citations of authorities, of this contention will be found, pages 21-24 of our original brief.

The record shows that the questions that were before the trial court went to the Supreme Court, which reviewed them in its appellate capacity. Therefore, before discussing whether the federal question was before the highest court, we will treat the matter as follows:

The Federal Question Set Up and a Right Denied Thereunder.

For a discussion of this subject and to save repetition, we invite the court's attention to pages 24-30 of our original brief, and to show that the question was properly and seasonably presented in the trial court we also invite consideration of pages 30-34 of our original brief.

With these full discussions already before the court, we will here merely say,

That the suit was brought under the act.

That the plea made squarely traversed the complaint.

That therefore the proceedings are properly referable to the act.

That you can not sue under the act and recover at common law or under the State statute, and that we were entitled to instructions—

CONSTRUING THE LAW APPLICABLE TO ADMITTED EVIDENCE IN ITS ASPECT MOST FAVORABLE TO THE PLAINTIFF IN ERROR. THAT THIS WE CLAIMED AS OUR RIGHT. THAT THIS WE WERE DENIED. THAT THE DENIAL WAS THE DENIAL OF A RIGHT CLAIMED UNDER A FEDERAL STATUTE, AND THAT THE DECISION WAS AGAINST THIS RIGHT SPECIALLY SET UP AND CLAIMED BY US.

Pages 35-55 of our original brief discusses fully instructions asked for which we considered we were entitled to in order that the act be properly construed, and the exceptions taken by us all of which went to the Supreme Court.

These instructions were discussed without going any further into the merits of the case than was necessary to intelligently state the questions. We will not here undertake again to review all of these instructions. We will, though, as illustrative, discuss one instruction given by the trial judge against plaintiff's objection, on the issue of contributory negligence, which is found page 80 of the record. The assignment is as follows:

"If you find from the evidence that the plaintiff had no right to go into the express car; that he was not where he should have been; and you further find that he would not have been injured but for his going into the express car, *and that his going into the express car was such an act on his part that a reasonably prudent man ordinarily would not have done under the circumstances of the situation*, then he would be guilty of contributory negligence, and it would be your duty to answer the second issue 'Yes.' If you do not so find, it would be your duty to answer the second issue 'No.' "

To discuss this understandingly we will have to refer to the course of the trial and the state of the evidence when the cause came to be submitted to the jury. This is done, NOT TO RETRY QUESTIONS OF FACT, WHICH WE MAY NOT DO, but to see whether error was committed in what the judge said to the jury.

Duvall, the defendant in error, was a baggage-master, in the service of the plaintiff in error, and he was injured in a head-on collision.

The record shows that there is no dispute on the point that when the trains came together Duvall, the defendant in error, was not in the baggage car. He was in the express car.

The rules of the defendant railway, a copy of which the defendant in error admitted was in his possession at the time of the collision, provided as follows:

Number 664. They must report for duty at the appointed time; remain in baggage cars while on duty, except when required to take the place of brakeman. Be civil and obliging to passengers, and not permit any one to ride in the baggage car except those whose duties require it.

Duvall, the defendant in error, contended that he went into the express car by the direction of the conductor. There is also a rule that states that the baggage-master must obey the orders of the conductor. The railway, the plaintiff in error, contended that Duvall was in the express car, not under an order from the conductor, but by an invitation from the express messenger, assisting in checking up the express matter, and that the messenger, Duvall, the baggage-master, and Cox, the conductor, were in the express car drinking just a few minutes prior to the wreck.

The plaintiff in error, railway, offered evidence tending to show that if the defendant in error had remained at his post of duty in the baggage car, where the rules of the company required him to be, he would not have been injured.

W. P. Rowe, the express messenger, witness for the plaintiff in error (record, p. 34) testified as follows: "I said to him, I have a heavy run and am not yet through work. I asked him if he would agree to come in and help me soon after leaving Raleigh, and he agreed to do so and did come in. It was not long before the wreck that Cox, the conductor, came into my car, about ten minutes I would say. He remained there until the wreck occurred. I did not send for him that night. Did not tell Mr. Duvall to tell him to come in there. After Mr. Cox and Duvall came in, Mr. Duvall was helping me for a short while—four or five minutes—when Mr. Cox came in and we three took a drink of whiskey."

This same witness Rowe also related a conversation he had with the conductor Cox in the presence of Duvall, when they were in the hospital, at which time the conductor was endeavoring to get up some excuse to account for the presence of himself and the baggage-master in the express car at the time of the wreck and suggested that it could be understood that they were in the express car because of a suspected robbery of the express matter. (This evidence may be found on page 35 of the record.)

The plaintiff in error introduced and examined eight witnesses who viewed the wreck immediately after it took place, whose evidence tended to prove that the express car was completely demolished, while the baggage car was practically intact, with the exception of the front end, which had telescoped the express car, and that the baggage was taken out, but little damaged, and the passengers in the rear end of the baggage car (one end of it was used for passengers) escaped practically unhurt.

In the light of the above evidence we will discuss the error involved in the said sixth assignment of error found on pages 80 and 105 of the record.

The trial judge in the State court presented to the jury the issue of contributory negligence arising out of the conflict of the evidence hereinbefore pointed out as to whether Duvall was properly in the express car at the time of the impact of the trains, but he added these words in presenting the issue, "*and that his going into the express car was such an act on his part that a reasonably prudent man would not have done under the circumstances of the situation.*"

The foregoing italicized words show clear and palpable error. It needs no argument. The rule of the prudent person as between the master and servant can not possibly arise if it is made to appear that the injury proceeded from the violation of a rule made by the master. If that

is not true then a servant may at any time substitute his judgment for that of the master.

The following illustration will show the utter absurdity of applying the rule of the prudent person to an issue of contributory negligence.

A is a rear brakeman on a train engaged in interstate commerce. The railway promulgates a rule to the effect that "rear brakemen must remain at their posts of duty at the rear end of the train." *A* concludes that he will go up and ride on the engine. His work does not carry him there. While so riding on the locomotive there is a head-on collision and he is seriously injured. He then brings his suit under the Federal Employers' Liability Act in the State court. The head-on collision presumes negligence on the part of the railway. The railway on the trial of the cause introduces evidence tending to show that if *A* had not violated the rule and had remained at the rear end of the train he would have suffered no damage. The railway can not have a diminution of the verdict unless it be found by the jury that the injured party was guilty of contributory negligence. So then the judge proceeds to charge the jury, as was done in this case, that there can be no contributory negligence unless *A* *acted imprudently in violating the rule*.

We most respectfully submit;

1. That the rule of the plaintiff in error requiring the baggage-master to remain in his car was a reasonable one.
2. That if the defendant in error was injured because of a violation of that rule he was guilty of contributory negligence.
3. That in the proper construction of the Federal Employers' Liability Act the plaintiff had the right to have the question of contributory negligence submitted to the jury without the qualification of the rule of the prudent person being included in the instruction.

Then if the jury should find that there was no contributory negligence the plaintiff in error will be bound by what the jury may find, but on the other hand if the defendant in error was guilty of contributory negligence then the amount of damages under the Federal Act would be "diminished by the jury in proportion to the amount of negligence attributable to such employee."

The plaintiff in error relies with very great confidence on the case of *St. Louis I. M. and S. Railway v. Taylor*, 210 U. S. 293, from which we quote as follows:

"Where a party to litigation in a State court insists by way of objection to, or requests for instructions, upon a construction of a statute of the United States, which will lead, or, on possible findings of facts from the evidence may lead to a judgment in his favor, and his claim in this respect being duly set up, is denied by the highest court of the State, then the question thus raised may be reviewed in this Court. The plain reason is that he has claimed in the State court a right or immunity under the laws of the United States and it has been denied to him."

We will add that the above case decided in May, 1908, has been approved by the court in a number of cases, particularly in *Cody v. Arts*, 213 U. S. at page 238, in which Mr. Justice Day has this to say, the bankrupt act being under consideration:

"A construction of the act is insisted upon by the appellant which would defeat the lien. On the other hand the construction contended for by the appellee would give the lien validity. In such a case had the case been in the State court, it could have been brought here for a review under section 709 of the Revised Statutes."

Under the principle enunciated in *St. Louis R. R. v. Taylor, supra*, the plaintiff in error is entitled to a new trial.

The following issues were submitted to the jury.

1. Was the plaintiff injured by the negligence of the defendant?

Answer. Yes.

2. Was the plaintiff's injury caused by his contributory negligence?

Answer. No.

3. What damages is the plaintiff entitled to recover?

Answer. Thirty thousand dollars.

(P. 11, rec.)

Now, then, if the plaintiff in error was guilty of negligence, and if the defendant in error was guilty of contributory negligence, then under the Federal Employers' Liability Act the plaintiff in error would have *the right* that—

"The damages be diminished by the jury in proportion to the amount of negligence attributable to such employee."

The words just quoted are taken from the Federal Employers' Liability Act.

We press upon the attention of the court that there was error in the charge of the judge in the State court on the question of contributory negligence.

If the judge in the State court had properly presented the issue of contributory negligence to the jury it might have resulted in a finding that the defendant in error was guilty of contributory negligence, and the result would have been an apportionment of the damage, but on erroneous instructions to the jury it was found that the defendant in error was not guilty of contributory negligence, and therefore the plaintiff in error was deprived of this right under a proper construction of the statute.

In our original brief we discussed the instructions to the jury, pages 37-55, under the following heads:

I. WHERE A SERVANT DEPARTS FROM THE SPHERE OF HIS ASSIGNED DUTIES THE RELATION OF MASTER AND SERVANT IS CONSIDERED AS TEMPORARILY SUSPENDED, AND HIS POSITION THEN BECOMES THAT OF A TRESPASSER OR A BARE LICENSEE. (Original brief, pp. 37-40.)

II. THE DEFENDANT IN ERROR NOT HAVING BEEN ACTUALLY ENGAGED IN INTERSTATE COMMERCE AT THE TIME OF HIS INJURY CAN NOT RECOVER UNDER THE PROVISIONS OF THE FEDERAL EMPLOYERS' LIABILITY ACT. (Original brief, pp. 40-47.)

III. THE DEFENDANT IN ERROR HAVING DEPARTED FROM THE SPHERE OF HIS ASSIGNED DUTIES, THE RELATION OF MASTER AND SERVANT WAS THEREBY SUSPENDED AND THE RECEIVERS OF THE PLAINTIFF IN ERROR THEREFORE OWED HIM NO GREATER DUTY THAN THEY OWED A TRESPASSER OR A BARE LICENSEE. (Original brief, pp. 48-55.)

We believe the authorities cited in the discussion under these three heads will unquestionably show that instructions were given the jury applicable to evidence before the court which denied to us the construction of the federal statute that we were entitled to have.

The Highest Court of North Carolina Reviewed the Case Under the Federal Statute.

The questions we have already discussed that arose in the trial court all went into the record of the case which by appeal was taken to the Supreme Court of North Carolina.

The chief justice, who rendered the opinion, stated therein as follows:

"This action was brought for personal injuries sustained by him in a head-on collision near Sanford, on a

freight train going south. The exceptions are numerous, but the real points in the controversy lie within a small compass. The defendant contends that under the Federal Employers' Act the plaintiff is not entitled to a recovery for three reasons:

- " 1. That at the time of the injury the plaintiff was not an employee of the defendant.
- " 2. That he was not injured while engaged in interstate commerce.
- " 3. That he was not injured as the result of defendant's negligence " (p. 91, rec.).

This statement by the chief justice, that the federal question was before the court and passed on by it, is too plain to need any elucidation or corroborative support.

However, as this court has held that the certificate by which the case was sent up to this court may serve to elucidate the determination of whether a federal question exists, we would add that the writ of error was granted by the chief justice of the Supreme Court of North Carolina who had rendered the opinion in the case upon a petition considered by him, that declared the case was brought under the Federal Statute. That certain federal questions were presented to his court and that the construction placed upon the same was adverse to the construction asked by the plaintiff of those questions (p. 101, rec.).

For a further discussion of this subject see pp. 16-20 of our former brief.

For a discussion of the fact that the decision of the Supreme Court of North Carolina was based upon an erroneous conception of the testimony, as the same appears in the record, see pages 55-61 of our original brief.

The Defendant in Error's Citations.

There are two cases cited in the last brief not in defendant in error's first brief, to which we will call the attention of the court:

The defendant in error cites *Troxell v. Del. L. and W. R. R.* 180 Federal Reporter, page 871. (See his last brief, bottom page 5.) In the *Troxell* case the point presented to and decided by the court is thus stated in paragraph 3 of the syllabus of that case:

"Where a fireman on a train carrying both inter-state and intra-state commerce was killed, his widow was not limited to a suit under the Federal statute, the Federal Employers Liability Act of April 22nd, 1908, but was also entitled to sue under a State law not in conflict therewith."

We do not controvert the correctness of that position. On those facts it is clear that the aggrieved party had two forums into which she might go to assert her rights, one in the State courts, and another in the Federal courts, but our position is that a party having a cause of action can not bring his suit in a State court under a Federal act, as the defendant in error in this case has done, and then insist that he is not bound by the terms of a statute, the aid of which he has solemnly invoked, in order to recover from his adversary.

The defendant in error, on page 7 of his last brief, cites *Thompson v. Wabash R. R.* 184 Federal Reporter, at page 554.

We do not question the correctness of the law as laid down in that case, but we do assert that it has not the slightest bearing on the case now at the bar of this court. In the *Thompson* case, *supra*, the plaintiff brought her action in the State courts under a State statute. The defendant railway made an effort to have the case tried in the federal courts, and Dupree, district judge, held that the "Act of Congress in question did not do away with the State statute."

That is to say, the party brought his action in the State court on a State statute, while in the case now under review by this court, Duvall, the defendant in error, brought his suit in the State court under a *federal statute*.

Respectfully submitted,

HILARY A. HERBERT,

BENJAMIN MICOU,

RICHARD P. WHITELEY,

WALTER H. NEAL,

E. T. CANSLER,

Counsel for Plaintiff in Error.

5

Seal Supreme Court, U. S.
FILED.

DEC 6 1911

JAMES H. MCKENNEY,
CLERK.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1911

SEABOARD AIR LINE RAILWAY }
Plaintiff in Error }
v. }
ERNEST N. DUVALL }
Defendant in Error } No. 304

Defendant in Error's Motion to Place Cause on
Summary Docket, Notice and Supplemental
Brief on Motion to Dismiss the Writ of Error
or Affirm the Opinion and Judgment of the
Supreme Court of North Carolina,
and
Brief of Defendant in Error on Merits of Said Case.

WILLIAM C. DOUGLASS
Counsel for Defendant in Error



IN THE

Supreme Court of the United States

OCTOBER TERM, 1911

SEABOARD AIR LINE RAILWAY,
Plaintiff in Error. }
v.
ERNEST N. DUVALL, }
Defendant in Error. } **No. 304.**

ON WRIT OF ERROR TO THE SUPREME COURT OF NORTH CAROLINA.

Motion on Behalf of Ernest N. Duvall, Defendant in Error.

Comes now the defendant in error, Ernest N. Duvall, by his counsel appearing in his behalf, and moves the court to order this cause transferred to the "Summary Docket," provided for by this court in an amendment to Rule 6, "Rules of the Supreme Court of the United States," promulgated October 23, 1911, upon the grounds that it is manifest that the writ of error was taken for delay only, and that the questions on which the decision of the cause depend are so frivolous as not to need further argument, and that the case is of such a character as not to justify extended argument.

The grounds of this motion and the statement of the case and facts and arguments are more fully set forth in the formal motion heretofore made and in the briefs of counsel for defendant in error filed in this court, all of which is herewith submitted.

WILLIAM C. DOUGLASS,

Counsel for Defendant in Error.

Ernest N. Duvall.

Notice to Seaboard Air Line Railway.

To SEABOARD AIR LINE RAILWAY, Plaintiff in Error, and
WALTER H. NEAL, its Counsel:

Please take notice, that on Monday, December . . ., 1911, A. D., at the opening of court, or as soon thereafter as counsel can be heard, the motions, of which the foregoing are copies, will be submitted to the Supreme Court of the United States for the decision of the Court thereon.

Annexed hereto is a copy of the motion to dismiss, the original brief and the additional brief and argument to be submitted in support thereof.

WILLIAM C. DOUGLASS,
Counsel for Defendant in Error.

Service of a copy of the above-mentioned motion, notice and copy of brief and additional brief acknowledged and accepted, this . . . day of . . ., 1911.

SEABOARD AIR LINE RAILWAY,
Plaintiff in Error.
By , Counsel.

IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1911.

SEABOARD AIR LINE RAILWAY,
Plaintiff in Error, }
v. } No. 304.
ERNEST N. DUVALL, }
Defendant in Error.

Defendant in Error's Supplemental Brief on Motion to Dismiss the Writ of Error for Want of Jurisdiction.

The plaintiff in error in its brief filed in this case devotes twenty-three pages thereof in attempting to establish that the action was *brought and tried*, in both the trial court and the Supreme Court of North Carolina, under the Federal Employers' Liability Act.

Under all of the evidence in this case, it must be conceded that at the time of the injury complained of, the plaintiff in error was engaged in both interstate and intrastate commerce. There is no allegation in the complaint that the plaintiff in error was engaged exclusively in interstate commerce at the time of the injury. The allegation in respect to this is as follows:

"Were operating a line of railway from Portsmouth, Va., via Moneure, N. C., and other points and stations, to Monroe, N. C., and points beyond."
(Page 2 of the record.)

The only allegations in the complaint touching upon the defendant in error's occupation at the time of the injury are

as follows: "*Plaintiff was in and upon said passenger train in the discharge of his duty as baggagemaster and flagman* (page 2 of record), and (after stating the movement of the train), *upon which plaintiff was employed and engaged.*" (Page 3 of record.)

The answer of plaintiff in error (pages 9, 10, 11 of the record) simply denies "*that the defendant in error was in the employ of plaintiff in error as baggagemaster and flagman, and in the discharge of his duties as such upon said train.*" Nowhere in the complaint does the defendant in error allege that at the time of the injury he was engaged or employed in *interstate commerce* or in the performance of *interstate duties*. Nor does the plaintiff in error anywhere in its answer allege that defendant in error was engaged or employed in *interstate commerce*, or was in the performance of *interstate duties* when he was injured, or that he should have been so employed. On the other hand, the entire evidence in the case shows conclusively that the defendant in error had in his charge and keeping no *interstate baggage*, but that he did have in his charge a large amount of *intrastate baggage*; and, further, the plaintiff in error's principal contention before the Supreme Court of North Carolina was, and still is before this Court, (2) "*That he (defendant in error) was not injured while in interstate commerce.*"

So, it seems that under the pleadings in this case and the contentions of the plaintiff in error, the defendant in error "was neither engaged in nor was injured while in *interstate commerce*"; that he has never *alleged* that he was, and that neither the Federal Employers' Liability Act nor any other Federal statute have any bearing in this cause, and that this Court has no jurisdiction herein.

It is true that the trial judge in settling the case on appeal uses this language: "This was a civil action instituted by plaintiff and tried under the Employers' Liability Act," etc., but the trial judge does not say that the action "was instituted" under the Employers' Liability Act. (Page 13 of the

record). If he had so declared, this could not make it so. This Court will look to the complaint, or declaration itself, to ascertain whether or not the action was so *brought*.

We contend, that in order that the defendant in error might have availed himself of the benefits, or subjected himself to any restrictions contained in the Employers' Liability Act, he should have *specifically alleged* that "at the time of the injury the carrier was engaged in interstate commerce," and that "*he was employed by the carrier and engaged in interstate commerce at the time of the injury.*"

Mr. Justice White, in *Howard v. Illinois Central Railroad Co.*, 207 U. S., 463, says:

"Thus the liability of a common carrier is declared to be in favor of 'any of its employees.' As the word 'any' is unqualified, it follows that liability to the servant is co-extensive with the business done by the employer whom the statute embraces; that is, it is in favor of any employee of all carriers who engage in interstate commerce. . . . the act then being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of their employees, without qualification or restriction as to the business in which the carriers or their employees may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce."

The Court further says in said case:

"One engaged in interstate commerce does not thereby submit all its business to the regulating power of Congress."

In the case of *Troxell v. Delaware, L. & W. R. Co.*, 180 Fed., 871, Judge Holland, after discussing the various cases construing the Federal Employers' Liability Act, says:

"In neither of these cases was the question considered as to whether or not a recovery could be had under the provisions of a State law to recover damages for negligence of a common carrier engaged in both intrastate and interstate commerce at the time the alleged damage was inflicted. There is no doubt but that if this Federal act is to be maintained it must be upon the ground that it relates solely to employers engaged in interstate commerce, and the States must be permitted to deal with the questions between the employer and employee in matters wholly within the State. A more complicated situation will arise, as it did in this case, when the carrier is engaged in both intrastate and interstate commerce, and that the work upon which the employee is engaged when injured is both the work of intra- and interstate commerce. We are inclined to the view that in a situation like the one at bar, when the carrier is engaged in both intra- and interstate commerce and negligently causes the death of an employee in similar employment, that the personal representative of a decedent may institute a suit under the Federal Act, or action may be brought under a State act which is not in conflict with the Federal Act."

If the complaint under consideration brings this case under the provisions of the Federal Employers' Liability Act, then every allegation of injury sustained by an employee, when the railroad on which he is injured crosses a State line, if he dares to allege the facts, brings the case under the Federal Employers' Liability Act, whether or not the railway company or the injured employee or both were engaged in either intra- or interstate commerce, or both intra- and interstate commerce, at the time of the injury.

Is it possible that in actions of this kind when the complainant simply alleges that he was injured by a railway

company which was operating a train from one State into another, that the courts can assume that both the railway company and the injured employee were at the time of the injury engaged and employed in interstate commerce; and this in face of the fact that it is conceded that both the railway company and the employee were engaged in both intra- and interstate commerce?

In the case of *Franke v. Harmonas*, 216 U. S., at page 304, Chief Justice White, delivering the opinion of the court, says:

"There is not even color for the proposition that the bill presented a controversy arising under a law of the United States. To sustain such a contention it must appear that a controversy of that nature was called to the attention of the lower court in such a way as to invoke its action therein. In other words, after a case has been decided below, parties may not, for the purpose of a review by this court, attempt to inject a Federal question into the cause by suggesting that it would have been possible by a latitudinarian construction of the pleadings to suggest that a right under the Constitution or laws of the United States was relied upon."

In the case of *Thompson v. Wabash R. Co.*, 184 Fed. Rep., 554, in an action in which the complaint was almost identical with the complaint in the case at bar, the defendant filed a petition for removal to the United States District Court, and, among other things, alleged in the petition "that the suit arose under the law of the United States (Federal Employers' Liability Act). The State court refused to remove the case, and the defendant then filed a transcript in the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri, and upon a motion made by plaintiff to remand, Dupree, District Judge, says:

"The question here is as to whether this act of Congress (Federal Employers' Liability Act) does

away with the State statute authorizing the widow to sue for and recover damages against the railroad company through the negligence of whose officers or agents her husband lost his life, or is it an act giving employees an additional forum in which, under certain circumstances, they may go for the redresses of wrongs?

"My opinion is, that the circuit court of Randolph County has complete jurisdiction to try and determine the case. The laws of the State give the right to the wife to recover for the death of her husband, and this right is in no way interfered with by the act of Congress to which reference is made."

So that, as to this phase of the case, we conclude:

1. That there is no allegation in the complaint which brings this case under the Federal Employers' Liability Act.
2. That there is no allegation in the answer which raises any question under the Federal Employers' Liability Act.
3. That there was no allegation in the answer, nor was there any issue submitted or sought to be submitted by the plaintiff in error raising any question under the Federal Employers' Liability Act.
4. There was no prayer for instructions which in any way related to the Federal Employers' Liability Act.
5. That the complaint stated a good cause of action in respect to the occurrence of the injury in intrastate traffic under the common and statute laws of the State of North Carolina.
6. That no construction of the Federal Employers' Liability Act was sought in the trial court.

Under the liberal practice prevailing in the States of this Union, if the action had been clearly brought under the act of Congress, yet if it had developed under the evidence in the case at bar that at the time of the injury the defendant in

error was not engaged in interstate commerce, if the complaint and the evidence were sufficient to justify a recovery under the common or statute laws of the State, the defendant in error would be entitled to a judgment for damages for the injuries sustained by him.

We further contend in this case, that if the court should be of the opinion that the right, title, privilege or immunity relied on by the plaintiff in error was specially set up or claimed, that it was not set up at the proper time, nor in the proper way.

Chief Justice Fuller, in delivering the opinion of the court in *Mutual Life Insurance Co. of New York v. McGrew*, 188 U. S., at page 484, says:

“The proper time is in the trial court whenever that is required by the State practice, in accordance with which the highest court of a State will not review the judgment of the court below on questions not raised therein.”

Citing the cases of:

Speas v. Illinois, 123 U. S., 131; *Jacobi v. Alabama*, 187 U. S., 133, and several other cases.

“The proper way is by pleading, motion, exception or other action, part, or being made part, of the record, showing that the claim was presented to the court.” And in quoting *Oxley Slave Co. v. Butler County*, 166 U. S., 648, declares that “the assertion of the right must be made unmistakably, and not left to mere inference.”

The Supreme Court of North Carolina can only take cognizance of errors of the judge.

Reed v. Moore, 25 N. C. (3 Iredell), 310.
State v. Gallimore, 29 N. C. (7 Ired.), 147.
State v. Collins, 30 N. C. (8 Ired.), 407.

The Supreme Court of North Carolina regards a statement of the case as a bill of exceptions.

The rule of the Supreme Court is to regard as nearly as it can the case made by the judge in the light of a bill of exceptions of specified errors, and no exceptions are considered unless they appear upon the record.

King v. King, 20 N. C. (4 Dev. & Bat.), 164.

Riggs v. Evans, 27 N. C. (5 Ired.), 16.

"The Supreme Court in cases at law is strictly a court of errors and can only notice matters appearing on the record in the bill of exceptions or the statements in the nature thereof."

State v. Lankford, 44 N. C. (Busbee), 430.

Brown v. Kyle, 47 N. C. (2 Jones), 442.

In Hughes Federal Procedure, section 194, page 489, it is said:

"In order to avail of the right to review the action of a State court on a Federal question, it must be raised in the State court in the manner in which a question of that nature should be raised by the State practice, and the record must show this."

Nowhere in the case on appeal or in the assignments of error from the trial court or in the appeal to the Supreme Court was there any right, title, privilege or immunity set up or claimed by the plaintiff in error, or any construction asked on the Federal Employers' Liability Act. So that, under the foregoing decisions, the Supreme Court of North Carolina, being *confined solely to the record as a bill of exceptions*, had no right, under the rules prescribed for its government, to pass upon any such question, and in fact did not do so.

The plaintiff in error having studiously avoided any reference to a Federal question in the trial court, came into the Supreme Court of North Carolina and contended that, under

the Federal Employers' Liability Act, the defendant in error was not entitled to recover for three reasons:

1. That at the time of the injury the defendant in error was not an employee of the plaintiff in error.
2. That he was not injured while in interstate commerce.
3. That he was not injured as the result of plaintiff in error's negligence.

This being the first time that by inference any reference was made to the Employers' Liability Act, the court properly, and under the rules governing its conduct, did not pass upon the Federal questions, if such they were, that plaintiff in error attempted to set up or claim, because of the fact, among other things, that the plaintiff in error had not at the proper time, to-wit: *in that trial court*, raised these questions *as required by the practice in the State of North Carolina.*

In *Michigan Sugar Co. v. Michigan*, 185 U. S., 112, it is held:

"The jurisdiction of this court to re-examine the final judgment of a State court, under the third division of section 709, cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing the case here from such court intended to assert a Federal right. The statutory requirement is not met unless the party unmistakably declares that he invokes, for the protection of his rights, the Constitution, or some treaty, statute, commission or authority of the United States."

In *In re Buchanan*, 158 U. S., 31, it is held:

"The specification in a motion for a new trial that 'the verdict of the jury is not such a verdict as is contemplated by the Constitution of the United States or the Constitution of the State of New York, the only verdict recognized thereunder is that of a

jury of twelve men of sound mind and memory, which this verdict is not . . . falls far short of that specific assertion of a right, privilege or immunity under the Constitution at the proper time and in the proper way, upon the denial of which this court is entitled to re-examine the judgment of a State court on writ of error."

In *Clark v. Com.*, 128 U. S., 395, it is held:

"A Federal question is not raised by instructions to the jury asked with a view of raising such question where the evidence upon which they were based does not appear in the record."

If, then, the action was not brought under the act of Congress, it can make no difference how the case was tried or what construction, if any, the Appellate Court placed upon the act of Congress. If the action was not *brought* under the Employers' Liability Act the plaintiff in error has been denied no right, privilege or immunity under it. If the action should have been brought under said act and was not, this was subject of demurrer in the trial court and was waived.

If the Federal statute, Federal Employers' Liability Act, and the statute laws of North Carolina are so similar that a given complaint will state a good cause of action under either, then the defendant in error ought not to be forced into the position of having intended to bring his action under the Federal statute to enable plaintiff in error to have a review under a writ of error.

In the trial court the plaintiff in error studiously avoided any reference to the Employers' Liability Act either in its answer or prayers for instructions. Evidently it was trying to "slip up on the defendant in error" with a Federal question which it persistently covered up through the proceedings in the trial court.

THIS COURT HAS REPEATEDLY HELD THAT A PARTY DESIRING TO RAISE A FEDERAL QUESTION MUST DO SO IN A STRAIGHTFORWARD, OPEN AND SPECIFIC MANNER.

The defendant in error filed his complaint in this action, setting up unquestionably a good cause of action in respect to an injury sustained in intrastate commerce. It is true that the complaint also alleges, in substance, that the wrecked train was on a run from Portsmouth, Va., to Monroe, N. C., at the time of the injury. Not a word is written in the complaint other than this that could be construed to mean that either plaintiff or defendant in error was at the time of the injury engaged in interstate commerce. The evidence shows conclusively that the plaintiff in error on the said trip was engaged in both intra- and interstate commerce. The plaintiff in error admits and contends that at the time of the injury defendant in error was not engaged in *interstate commerce*. Then why contend that the Federal Employer's Liability Act can come in question, even for construction, in this case? If the defendant in error had omitted the allegations as to the initial starting point and destination of the wrecked train, would the Employers' Liability Act have been brought in question? Certainly not. Then we find the true contention of the plaintiff in error as to this phase of the case—that because the defendant in error alleged in his complaint that the train upon which defendant in error was injured started in Virginia and the injury occurred in North Carolina, that this, and this alone, shows that he brought his action under the Employers' Liability Act, notwithstanding the fact that the evidence shows that this train was engaged in both interstate and intrastate business. In other words, that this allegation as to the starting and destination of this train is conclusive on the defendant in error that he brought his action under the Federal Employers' Liability Act, and that alone. Under the terms of the complaint, a contention

that the action was brought under the common and statute law would be much more forcible.

In *Troxwell v. Delaware, L. & W. R. Co.*, 180 Fed., 871, it is held :

"Where an action against an interstate carrier for death of a servant, the complaint alleged that the defendant was engaged in transporting both freight and passengers and of interstate and foreign commerce, such averment did not allege that defendant was engaged in transportation of freight and passengers 'in' interstate and foreign commerce, and must therefore be taken as an averment of the transportation of freight and passengers in both interstate and intrastate commerce.

"When a fireman on a train carrying both interstate and intrastate commerce was killed, his widow was not limited to suit under the Federal Employers' Liability Act, but was also entitled to sue under a State law not in conflict therewith."

THIS STATUTE DOES NOT PREVENT AN EMPLOYEE NOT COMING WITHIN ITS PROVISIONS BRINGING AND MAINTAINING AN ACTION ON A COMMON-LAW LIABILITY OF THE CARRIER.

If, as contended by plaintiff in error, the defendant in error at the moment of the injury must be engaged in interstate commerce, why did not plaintiff in error, in fairness to the trial court and the defendant in error, make a square denial of this and a clear-cut issue before the court? But, the plaintiff in error may say, that there was no direct allegation in the complaint that the injury occurred *while* defendant in error was engaged in interstate commerce. Our reply is, that if the complaint does not allege that defendant in error was injured *while* engaged in interstate commerce the action was not brought under the Employers' Liability Act, and this Court has no jurisdiction to review the decision of the State court.

If plaintiff in error had in its mind, or ever intended, to raise a Federal question by claiming a right under the Federal Employers' Liability Act, or any other Federal act, it had every chance and opportunity to do so in the trial court. Under the practice in vogue in the Superior Courts of North Carolina, it is the duty of the judge to instruct the jury fully upon every phase of the case and the law applicable to the evidence introduced, and if through oversight or error the court fails or is too lax in this statutory duty, then either party, of his own volition, may request the court, either in writing at the end of the general charge of the judge to the jury for further instructions. If the court has failed to charge as fully upon a certain phase of the case or the contentions of either plaintiff or defendant, or to give as clear and succinct a statement of the law arising in the case and as it is applicable to the facts in evidence, it is the right of either party to then and there request the court to give to the jury such other and further instructions as may be applicable and necessary to their proper consideration of the matters in dispute. And, under our North Carolina practice, if either party desires other instructions to be given the jury he must make such request at the conclusion of the judge's charge; and if not done then, it is not open to the appellant to except to the charge as given as not being sufficient. In order that the parties might not be prejudiced by his failure to charge the jury as fully as he should have done, he (the trial judge) asked counsel for both plaintiff and defendant in error (on page 82 of the record) "if they desired any further instructions to the jury, or wished any particular phase of the evidence commented on before the jury, or if there were any further instructions desired upon any line, to which counsel for both plaintiff and defendant said, there was not."

No mention having been made prior to this of any claim of a right under this Federal statute, it was the duty then of plaintiff in error to specially set up, plead and claim any such rights or immunities which it may have had under this

act. And the court having asked if there was any such instructions, the plaintiff in error said there was not and it is now bound by its concealment of its intention to raise any such question. In view of its conduct in the trial court, it was forever precluded from raising such a question in the Supreme Court of North Carolina, for that court takes cognizance only of exceptions appearing in the record and specially set up and relied upon in the record. Take these exceptions as they are enumerated in this record, and it will be seen that they refer to *proximate cause, assumption of risk, by being out of place of employment for the time being, and contributory negligence.* Not a single one of these exceptions relates, refers to, or has anything whatsoever to do with the Federal Employers' Liability Act, or any other Federal statute, and no right is claimed under it for any purpose. So that, since the attempt to raise the alleged Federal question was not made in the trial court, and after being asked by his Honor if any further instructions were desired, to which plaintiff in error answered that there not, and upon appeal to the Supreme Court of North Carolina no exception was made concerning a denial of plaintiff in error's alleged rights under the Employers' Liability Act, and no exception along such line of defense appearing in the record and specially relied on, then the plaintiff in error's alleged claim of a Federal right under this act came too late, and the decision of the Supreme Court of North Carolina being upon other and independent grounds, not savoring of a Federal nature, which grounds were broad enough in themselves to support the judgment, to our minds this writ of error is without foundation and should be dismissed.

In *State v. Bohanon*, 142 N. C., 695, it is held:

"Where a defendant did not ask for any additional instructions, he cannot complain that the court did not present to the jury his contentions."

Citing *State v. Martin*, 141 N. C., 832.

In *Simmons v. Davenport*, 140 N. C., 407, it is held:

"If a party desires fuller or more specific instructions than those given in the general charge, he must ask for them and not wait until the verdict has gone against him and then, for the first time, complain of the charge."

As we understand the practice in writ of error from the Federal Supreme Court to the State Supreme Court, under the third section of the Judiciary Act, some right, title, privilege or immunity must be claimed under the Constitution of the United States, or some statute thereof, which right, title, privilege or immunity must be denied by the court, and said right, etc., must have been specially set up and relied on in the trial court just as the prevailing practice in North Carolina as to contributory negligence. In order to avail itself of the defense of contributory negligence, this matter would have to be specially set up in the answer, proved on the trial and relied upon as a defense in bar of plaintiff's right to recover.

Cox v. Railroad, 123 N. C., 604, and numerous cases cited in note:

Morrison v. Railroad, 123 N. C., 414;

Bolden v. Railroad, 123 N. C., 614;

Powell v. Railroad, 125 N. C., 370, and

Cogdell v. Railroad, 130 N. C., 313.

From the above cases it will be seen that if contributory negligence is relied upon by a defendant as a defense, it must be pleaded in the answer, proved upon the trial and relied upon as a defense; not a mere hint or conjectural statement will be sufficient, but a specific plea of this matter relied upon must be made in the answer.

So that, as we understand the effect of one's right under the Constitution of the United States, or any Federal act, the right must be specially set up and relied on according to the

usages of pleading and practice in the trial court, and if this right is not properly claimed (if indeed a claim of such a right is to be made) according to the custom of pleading and practice in the State court, no definite claim of such a right appearing in the record, then no right under the Federal statute was denied plaintiff in error by the State courts of North Carolina.

In the Supreme Court of North Carolina, as shown by the judgment, the plaintiff in error took three positions: first, that at the time of the injury the plaintiff was not an employee of the defendant; second, that he was not injured while engaged in interstate commerce; and third, that he was not injured as the result of the defendant's negligence.

As to the first proposition; while we admit that the answer denied that "at the time of the injury the plaintiff was an employee of the receivers and in the discharge of his duty," we contend that the first prayer for instructions, in reference to the defendant in error "acting outside the scope of his employment," was not in keeping with the allegation in the answer, and the evidence in the case. If the plaintiff was not employed in attending to *intrastate baggage*, which under all this evidence alone, was carried in the baggage car, at the time of the injury, and if violating any rule, was one that related solely to intrastate commerce, how can plaintiff in error avail itself of this alleged dereliction in respect to *interstate commerce*? He could not be "acting outside the scope of his employment," in respect to *interstate commerce*, because at the time of the injury he had no *interstate duties to perform*, nothing of an interstate nature which commanded that he should remain in the baggage car and nothing pertaining to interstate commerce which called him to the baggage car. On the other hand, under the undisputed evidence in this case, the only call that he had in respect to *interstate commerce*, and the only duties of *interstate commerce* that he might be called on to perform were in the express car, where he was injured. It seems that the plaintiff in error is try-

ing to use an alleged neglect of *intrastate duties* by defendant in error as a crutch with which to hobble to the Federal statute for relief.

Again, "acting outside of the scope of employment," is a special plea and must be fully set up in the answer, and the burden is upon the party pleading it."

Under the second head, to-wit: "That the defendant in error was not injured while engaged in interstate commerce." If this contention is true, how can this Court acquire jurisdiction? But there is not one word in the answer or further defense of the plaintiff in error in reference to interstate commerce and not a line of evidence referring thereto. Neither was there a thing in any one of the prayers for special instructions bearing either directly or indirectly upon the question. The prayers for special instructions, evidently following the allegations in the further defense of contributory negligence, each and every one used the language "engaged in the discharge of the duties of his employment," and certainly *the burden was on the plaintiff in error* to establish this contention, while the prayers for instructions on each and every one of them sought to place *the burden of proof upon the defendant in error*. The plaintiff in error could not properly have raised a Federal question by prayers for instructions in the court below, which, under the rules of evidence as applied by the courts of the State of North Carolina, sought to place the burden of proof upon the defendant in error, when the law placed the burden of proof upon the plaintiff in error. *Bolden v. Railroad*, 123 N. C., 614. It was a pretty shrewd effort on the part of plaintiff in error to so frame its prayers as to place the burden of its defense on the defendant in error. It would have been error for the trial judge to have given the instructions prayed as requested, for this reason.

Upon the third proposition, "that the defendant in error was not injured as a result of the plaintiff in error's negligence," surely this was not a Federal question. The plaintiff in error consented to an issue on this question and the jury

found that the defendant in error was injured by the negligence of the plaintiff in error. None of the instructions prayed for touched upon this point. In fact, the plaintiff in error admitted that the defendant in error was injured by the negligence of one or more of its employees; so that, it appears to us that *the questions attempted to be raised by the plaintiff in error in the Supreme Court of North Carolina were after-thoughts, and did not fit into the instructions prayed for.* That the plaintiff in error came into the Supreme Court of North Carolina with three propositions that were not authorized by the record in the court below. The Supreme Court of North Carolina properly states that "the defendant contends, etc." We take it, however, that if these contentions were unwarranted by the record from the trial court, this Court would not review unless the highest court in the State voluntarily undertook to pass upon these questions. We earnestly contend that only one of these questions could in any view of the case be treated as a Federal question, to-wit: the second, mentioned in the judgment of the Supreme Court of North Carolina, "that he was not injured while engaged in interstate commerce," and we say that no allegation in the answer, no part of the evidence and prayer for instructions, as we have shown, raised this question. And further, if this contention had been properly set up and maintained in the trial court, the legal result could not have been changed, as hereinbefore shown in this brief.

Again, we contend that the Supreme Court of North Carolina did not pass on this question. All three of these were questions of fact, and if raised by the pleadings and the evidence, and the plaintiff in error wished them passed on, it should have tendered and had submitted distinct issues thereon to the jury. It could have tendered the following issues: First, "At the time of the injury was the plaintiff an employee and in the discharge of his duty?" Second, "Was he injured in interstate commerce?" An issue upon the third proposition was fully settled by the jury, that is,

that "he was injured by the negligence of the defendant." In fairness to the trial court, the defendant should have tendered these issues of fact in a plain straightforward way, and if it intended to raise Federal questions after the tendering of these issues, it could have asked for instructions on each in accordance with its views of the law.

Any findings of fact by the Supreme Court of the State of North Carolina in its judgment or decision, whether authorized by the judgment or not, are not reviewable by this Court, nor would any expression of opinion on the facts aiding the said Court in rendering its opinion be reviewable by this Court.

The Supreme Court of North Carolina is purely a court established for the review of errors of law made by the inferior tribunals of the State, and so this Court has only authority to review findings of law by the Supreme Court of the State of North Carolina. Therefore, eliminating the findings of fact or expressions of opinion upon facts in the judgment of the Supreme Court of North Carolina which is brought here for review, as before stated, we find the following decisions on the law: "*If the duties of the baggage man did not call him into the express car, the fact that he stepped into the adjoining express car for a moment would not have terminated his employment or put him out of the scope of his duties.* * * * *The plaintiff's going into the express car was not an unlawful act and under the circumstances could not have affected his employment or the responsibilities upon him.* * * *As to negligence, the head-on collision raised a presumption of negligence—Marcom v. Railroad, 126 N. C., 200, and cases cited in the annot. ed., and the issue of negligence was found by the jury.*"

So that, the only Federal question, "that he was not injured in interstate commerce" (if such is a Federal question), was not referred to, or passed upon by the Supreme Court of North Carolina in its decision, even if said question had been properly presented by the record. The only ques-

tions or contentions presented by the defendant in the Supreme Court of North Carolina that were referred to by the court in its decision, were, "that at the time of the injury the plaintiff was an employee of the defendant," and "that he was injured as the result of the defendant's negligence."

Again, upon the proposition that defendant in error was not injured as the result of the defendant's negligence, plaintiff in error overlooks the fact that on page 83 of the printed record (middle of page), the judge, under the plaintiff in error's own prayer for instructions, charged the jury as follows: "And if, upon the whole question, you are not satisfied by the greater weight of the evidence that the plaintiff was injured as the result of the negligence of the defendant, you will answer the first issue 'No,' etc." Thus placing the burden on the defendant in error in the identical language complained of in the exception of the plaintiff in error in the Supreme Court of North Carolina, as shown by the opinion of said court.

The Supreme Court of North Carolina was established solely for the review of errors of law made by the inferior tribunals of the State, and this Court is only authorized to review findings of law by the Supreme Court of the State of North Carolina.

"The United States Supreme Court cannot review the decision of the State Court upon a question of fact, though the Federal question would or would not be presented according to how the fact was decided." *Dower v. Richards*, 151 U. S., 663.

Israel v. Arthur, 152 U. S., 152;

Lloyd v. Matthews, 155 U. S., 223;

Grand Rapids Railroad Co. v. Butler, 159 U. S., 91;

Eastern B. and L. Asso. v. Ebor, 185 U. S., 121.

Therefore, after eliminating the findings of fact and expressions of opinion upon the facts in the judgment of the Supreme Court of North Carolina, which is brought here

for review (pages 91-92 of the record) we find that the Supreme Court of North Carolina decided no Federal question. Allegation two of defendant in error's complaint (page 2 of the record) alleges that plaintiff "was in the employ of the defendant as baggage-master and flagman on one of the defendant's passenger trains, etc."; and further, that "plaintiff was in and upon said passenger train and in the discharge of his duty as baggage-master and flagman."

The plaintiff in error, in answer to this allegation, says, that the plaintiff was not in the employ of the receivers as baggage-master and flagman and in the discharge of his duties at the time of the injury. Upon this allegation in the complaint, and the denial in the answer, the defendant asked for the following instructions: "That when an employee undertakes to do something not his duty to do, the master is not negligent, and if the jury shall find from the greater weight of the evidence that the plaintiff was acting outside of the scope of his employment when he was injured, they will answer the first issue 'No.' "

It will be noted that in addition to this denial in the answer, that the defendant in error was in the employ of the receivers and in the discharge of his duties upon the train when injured, the plaintiff in error attempted to raise questions in reference to "being outside the scope of his employment," specially, in its further defense of contributory negligence, and prepared its prayers for instructions, except the one heretofore quoted, based upon its further defense, but at the close of each requested answer as to the first issue; thus attempting to place the burden of contributory negligence upon the plaintiff, notwithstanding, in framing its answer it had availed itself of these defenses upon the plea of contributory negligence, and the burden was upon it to establish contributory negligence by the greater weight of the evidence.

The plaintiff in error chose in its answer to make the conduct of the defendant in error in going into the express car an act of contributory negligence, by way of a further de-

fense, and then complains in its brief that these questions were submitted by the trial judge under this principle and head. If, as hereinbefore stated, the court had given the first prayer, it would have been error because there was absolutely no evidence to support the charge.

If the doctrine of *res ipsa loquitur* applies in this case, and it certainly does, the burden of *every defense* was on the plaintiff in error in the trial court. The plaintiff in error sought to place this burden on the defendant in error in its prayers for instructions, and if plaintiff in error could have set up a Federal right, privilege or immunity, it could only do so by instructions properly framed in respect to the practice of the courts of North Carolina, and in keeping with the principles of the common law.

To say that the Supreme Court either construed or attempted to construe the Employers' Liability Act is far fetched, and not even by a latitudinarian construction of said decision can it be found that said court passed on, or refused to pass on, any Federal question necessary to a determination of this cause.

Respectfully submitted,

WILLIAM C. DOUGLASS,
Counsel for E. N. Duvall,
Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

SEABOARD AIR LINE RAILWAY,
 Plaintiff in Error.}
 v. }
ERNEST N. DUVALL, }
 Defendant in Error. } No. 304.

Defendant in Error's Brief on the Merits.**Statement.**

This action was brought by defendant in error for injuries sustained in a head-on collision while he was on his run as baggage master and flagman at a point on plaintiff in error's road near the station of Colon, in Lee County, N. C., on the morning of the 13th of March, 1909. This action was originally brought against the receivers of the Seaboard Air Line Railway, and the complaint filed against them. In the answer filed by the receivers they admitted the head-on collision; that plaintiff was injured by the negligence of defendant, and did not plead contributory negligence of plaintiff. At January Term, 1910, the receivers filed a plea in abatement, and among other things set up therein the settlement and discharge of the receivers, and alleged that the Seaboard Air Line Railway, in taking over the property and effects of said receivers and in reassuming control of said railway, assumed all liabilities, and among them any liability to defendant in error on account of the injuries sustained in the collision referred to in the pleadings.

Whereupon the action as to the receivers was allowed to abate, and on motion of the Seaboard Air Line Railway it was made party defendant, and, by agreement, filed an unverified answer to the original complaint. The complaint against the receivers being considered and treated, by consent, as being the complaint against the said Seaboard Air Line Railway. In this unverified answer of the Seaboard Air Line Railway, in article 3 thereof, as appears from the record, it admitted the head-on collision; that the same was caused by the carelessness of some of the agents of the defendant receivers. It denied that the wreck was caused by the gross negligence of the receivers, and avers by way of further defense that plaintiff caused and contributed to his own injury in that he left the baggage car and went into the express car where he was at the time of the collision.

In examining the pleadings and evidence in this case, as well as the charge of the judge, it seems to us that the plaintiff in error was highly favored, both in the rulings, in the rejection and the admission of evidence and the jury instructions by the judge.

Only one issue should have been submitted to the jury, that is, the *issue as to damages*. It is true that in article 1 of the further defense in Seaboard Air Line Railway's answer, it is alleged that "if the plaintiff was injured as the result of the negligence of the then receivers, which it denies, he caused and contributed to his own injury, because he left the baggage car where it was his duty to be and went into the express car of said train in violation of the rules of the receivers;" *but such contributory negligence, if such it could be called* (which is denied), *is not specially pleaded and set up as a defense in said further defense*. Again, said further defense in no way connects his going from the baggage car into the express car with the collision and wreck, and signally fails to show that his going into the baggage car, under the facts alleged, was the *proximate cause* of his injury. So that the further defense, in our opinion, is faulty, in that it fails

to state facts sufficient to constitute the defense of contributory negligence and does not plead said act in bar of a recovery.

In any event, in so far as the pleadings are concerned, certainly there was *only a question of damages* to be submitted to the jury; and if this is so, the exceptions to the refusal of the judge to give certain special prayers for instructions are without force and do not affect the proper trial of this cause.

It must be borne in mind that the plaintiff in error admits that the defendant in error was injured by the negligence of the receivers, and the judge might properly have instructed the jury, and we contend should have instructed the jury, to answer the first issue "Yes," or he might have answered it himself. But let us take a broad view of the evidence, both for plaintiff in error and defendant in error, and first as to the "contentions."

Contentions of Defendant in Error.

Defendant in error contends that he had the right to go on any part of the train; that it is a foolish proposition that any member of a train crew cannot rightfully go upon any part of a train upon which he is employed; that the express car was always used for interstate baggage; that the officers of the road knew the baggage was often carried in the express car; but waiving all of this, that he was subject to the orders of the conductor, and shortly before the collision he was ordered into the express car by the conductor. *It will be noted that the testimony that he was ordered into the express car by the conductor is not contradicted by any witness in this case.* The plaintiff further contends that no rule was introduced that plaintiff as flagman and baggage-master was *forbidden to go into the express car.*

Contentions of Plaintiff in Error.

The plaintiff in error contends that under the rules introduced defendant in error was bound to remain in the baggage car while on duty, but *it is admitted that he was bound to obey the conductor*; that the conductor had the right to go into the express car and to order the baggage man into that car, and that the plaintiff was in the express car assisting the express messenger at the time of the collision and wreck.

Now, these are the *contentions* as will appear upon the pleadings and evidence, with the exception that at the close of the further defense the plaintiff in error alleges that defendant in error would not have been injured if he had remained in the baggage car. This latter allegation is wholly unsupported by the testimony of the witness for the plaintiff in error, even if such allegation was material and that evidence admissible, which defendant in error denies.

The Trial.

The judge allowed the plaintiff in error to avail itself of the plea of contributory negligence, which under the strict rule of the law, as we understand the law, it could not do, being, as we understand it, confined to the *original defenses set up by the receivers* and a plea in fact which it failed to make in its attempted further defense.

This brings us to a *resume* of the evidence, even admitting, for the sake of argument that contributory negligence was properly pleaded in the plaintiff in error's further defense, and that the facts set forth therein, if proven, would defeat defendant in error's recovery:

Evidence of Defendant in Error.

Evidence of E. N. Duvall:

Was baggage-master and flagman. Was under conductor's orders and had to obey him. We always used the express

car for through baggage to save transfer at Hamlet. We were directed to do so by those in charge. (Pages 18, 19, of the record.) Twenty or thirty minutes before the wreck the express messenger asked where the conductor was, and said, "tell him to come up in my car." I told the conductor what the messenger said, and the conductor said, "All right, let's go see what he wants." The wreck occurred just as I got in the car. (Pages 13 and 14, of the record.)

Evidence of W. T. Cox, conductor:

Just before the wreck, when I got up in front end of train, the plaintiff said to me, "the express messenger wants to see you in his car." I said, "Well, come on, go with me and see what he wants." I got about middle of car when crash came. (Pages 27-28, of the record.)

The defendant attempts to meet this evidence as follows:

Evidence of Plaintiff in Error.

Evidence of W. P. Rowe:

Was route agent and had charge of the car. There was no baggage in the express car the night of the wreck. Plaintiff came in the car the night of the wreck, first between Weldon and Portsmouth. Soon after leaving Raleigh he came again, three or four minutes afterwards, and was there when the wreck occurred. He was assisting me in checking the freight—express packages. I said to him at Johnston street, Raleigh, "I have a heavy run and am not yet through work." I asked him if he would agree to come in and help me soon after leaving the station at Raleigh, and he agreed to do so, and did come. It was not long before the wreck the conductor came in my car—ten minutes. I did not send for him that night. Did not tell plaintiff to tell Cox to come in. When Cox had been in four or five minutes we then took a drink of whiskey. (Pages 34-35, of the record.)

This is the sum total of direct evidence bearing upon the question of supposed contributory negligence, and all other evidence in the case in reference thereto only bears upon the veracity of the witnesses.

So it will be seen that the instructions prayed for totally ignored the circumstances surrounding the defendant in error and the causes of his going into the express car and assumed that the going into the express car was *per se* negligence. Certainly, if the trial judge had given this instruction he would have been in error. The plaintiff in error in its prayer for instructions ignored the evidence on page 14, of the record, as follows:

"We always used the express car for through baggage to save transferring it at Hamlet. Were directed to do so by those in charge. When the conductor came to my car, I told him what the messenger said. He (the conductor) said, 'All right, let's go see what he wants.' " This evidence was uncontradicted, and yet the plaintiff in error sought in the instructions prayed for to place the burden on the defendant in error to satisfy the jury that when he went into the express car he was engaged in the discharge of the duties of his employment.

Plaintiff in Error's Exceptions.

The plaintiff in error came from the trial court to the Supreme Court of North Carolina with twenty-seven exceptions, all of which have been abandoned in its petition for writ of error to this Court except the sixteenth, eighteenth, twentieth, twenty-first, twenty-fifth and twenty-sixth, as will appear on page 99 of the record.

Plaintiff in Error's Sixteenth Prayer for Instructions. (No. 1, page 97, record.)

The plaintiff in error prayed the court for the following instruction, which was refused:

1. "That where an employee undertakes to do something not his duty to do, the master is not negligent; and if the jury shall find by the greater weight of the evidence that the plaintiff was acting outside of the scope of his employment when he was injured, they will answer the first issue 'No.' "

Going Into the Express Car Was Not the Proximate Cause of the Injury.

The plaintiff in error's first prayer for special instructions is a copy from instructions requested by the defendant in the case of *Patterson v. Lumber Co.*, 145 N. C., 42, with the difference that the defendant in that case applied the instructions to the issue of contributory negligence as well as to the first issue, but the case at bar is clearly distinguishable from that case. In the first place the plaintiff in error in the case at bar, admits negligence in its answer, and this issue should never have been submitted to the jury. It should have been answered by the judge. We can hardly conceive of a greater inconsistency than to admit negligence and then ask for instructions to the jury directing them in any phase of the case to find no negligence.

It may be that the plaintiff in error might have been entitled to the instruction contained in the latter part of the special prayer in case of *Patterson v. Lumber Co.*, *supra*, viz: "If the jury should find from the evidence that the plaintiff was acting outside of the scope of his employment when he was injured they will answer the second issue 'Yes,' " but for the fact that among others *there was no evidence that the defendant in error was acting without the scope of his employment*. If the defendant in error had gone into the express car and had been engaged in interstate duties and in doing something which brought about the injury—acting outside the scope of his employment, as was the case in *Patterson v. Lumber Co.*, *supra*, there would have been more reason for the request. The contention of

the plaintiff in error in the case is that the defendant in error was doing nothing, but he was simply in the express car when he should have been in the baggage car. The charge would have been bad in this case in that it assumed that going into the express car was the *proximate cause of the injury*.

In *McNeill v. Railway*, 135 N. C., at page 690, Justice Douglas, in quoting from the case of *Railroad v. Troutman*, 52 N. J. Law, 169, in speaking of a passenger recovering for injuries sustained while unlawfully traveling on Sunday, says:

“Nor was the plaintiff’s violation of the Sunday law in a legal sense the cause of her injuries. It was only the occasion for an injury by the defendant’s wrongful act, and hence her wrong-doing did not contribute to her injury in such a sense as to deprive her of her right of action; it was merely the condition and not a contributory cause of her injury.”

In *Patterson v. Lumber Co.*, *supra*, the plaintiff’s operating the machine of another employee was clearly the proximate cause of the injury.

In the case at bar there was no new risk which plaintiff assumed. The instruction prayed for assumes that going into the express car had direct connection with the wreck and injury.

Defendant in error was not doing anything or undertaking to do anything that brought about the injury, as was the plaintiff in *Patterson’s case*. And again, the request for instructions in *Patterson’s case*, *supra*, “That if the plaintiff was acting outside the scope of his employment when he was injured, etc.,” presupposes that thus acting outside the scope of his employment, if under the evidence he was so acting, was the proximate cause of the injury.

The real meaning embodied in this request, under the evidence in this case, is “that if the plaintiff was at any other

place on said train, other than in the baggage car and was injured, he could not recover," We contend that under the evidence in the case at bar this charge would have been wholly incorrect. In *Patterson v. Lumber Co., supra*, and other cases along that line, the charge may have been correct (though we think the charge should have embodied elements of proximate cause and should have been applied only to the second issue), because in that case the operation of the machine contributed to his injury; helped to produce it; formed part of the agency or force which injured him; and occupied, unmistakably, the relation of cause and effect to what happened to him. All of these elements are wanting in the case at bar.

But if we should admit, for the sake of argument, that in the case at bar the instruction was proper to be given, then we say that the judge in his charge did embody the principles contained in the prayer and went a bow-shot beyond under his instructions under both the first and the second issues. (Pages 79-80, of the record.)

The judge charged the jury as follows (page 79, record):

"The defendant contends, gentlemen of the jury, that it is not liable to plaintiff in this case in damages. Defendant admits that the act of the trains running together, the collision, was negligence on the part of some of its servants, but the defendant contends that this negligence of its servants in permitting or causing the trains to run together was not the proximate cause of the plaintiff's injury. Defendant contends that he, plaintiff, was in a place that he had no right to be; that he was in the express car when he was baggage master, and that the rules of the company under which he was working and employed forbade his going into the express car, and that if he had been in the baggage car and not in the express car he would not have been injured; that it was his own negligence in leaving a place safer than the express car that brought about and caused his injury.

"Was the plaintiff injured by the negligence of the defendant? Now, the burden of that issue is on the plaintiff, and he must satisfy you by the evidence, and the greater weight thereof, that he was injured by the negligence of the defendant, and that the defendant's negligence was the proximate cause of his injury. Gentlemen of the jury, in passing on that issue, as I said, defendant admits its negligence, but denies that its negligence was the proximate cause of the plaintiff's injury, and contends that the proximate cause of the injury was his going into the express car and not the negligence of the defendant. If you find from the evidence and the greater weight thereof, the burden being on the plaintiff, that the plaintiff's injury was caused by the defendant's negligence, proximately caused, you should answer the first issue 'Yes.' If you do not so find, you should answer it 'No.' "

Under the issue of contributory negligence (page 80, of the record), his Honor charged the jury: "If you find from the evidence that the plaintiff had no right to go into the express car, and that he was not where he should have been, and you further find that he would not have been injured but for his going into the express car, and that his going into the express car was such an act on his part that a reasonably prudent man ordinarily would not have done under the circumstances of the situation, then he would be guilty of contributory negligence, and it would be your duty to answer the second issue 'Yes.' If you do not so find, it would be your duty to answer the second issue 'No.' " (And on page 83 of the record):

"You should try and decide this case just as though you were passing upon a controversy between two of your neighbors, and you cannot consider the evidence of the plaintiff's injuries and suffering in passing upon the issues of negligence and contributory negligence, as the degree and extent of his injury have nothing whatever to do with the question of negligence and contributory negligence. And if, upon the

whole question, you are not satisfied by the greater weight of it that the plaintiff was injured as the result of the negligence of the defendant, you will answer the first issue 'No,' as the burden is upon the plaintiff not only to satisfy you that the defendant is guilty of negligence but that such negligence was the direct and proximate cause of the plaintiff's injury."

It will be noted that the judge did not even place the burden of proof upon the question of contributory negligence upon the plaintiff in error, where it should have been placed. He placed the contentions of both side by side, eliminating every explanation contained in the evidence that was in favor of the defendant in error and every excuse as to why the defendant in error was in the express car; did not give him the benefit of the evidence in regard to the abrogation of the rules; put the whole proposition on the question of *proximate cause*, and treated the case as if the defendant in error was undertaking to do something not his duty to do and was acting outside the scope of his employment. We are at a loss to see how the plaintiff in error can complain of this part of the charge and can insist that it was not broader and more liberal to it than that contained in the words of the first prayer for special instructions. In other words, the judge ignored the defendant in error's claim in respect to the abrogation of rules and his obedience to the direction of the conductor, and placed him upon the footing of a trespasser and placed upon him the burden to show, by the greater weight of the evidence, that his going into the express car was not the proximate cause of the injury, and in the absence of any evidence tending to show that the express car was a dangerous place *per se*, or that it was to any extent more dangerous than the baggage car, treated the act of the plaintiff's going into the express car as a trespass.

The plaintiff in error, as above stated, *admitted its negligence*, and hence the defendant in error's going into the express car as an act outside the scope of his employment, if submitted at all, should have been submitted under the *second*

issue alone, and the defendant got more than it was entitled to in having the jury to consider it under the first issue.

The evident purpose of the plaintiff in error was to place the burden upon the defendant in error to establish the fact that he was not guilty of contributory negligence, and if the plaintiff in error desired an issue or desired special attention called to the "*scope of employment*" feature, if such was authorized under its answer, it should have requested such instruction under the second issue.

Again, the defendant in error contends that the evidence in this case develops "negligence so wanton and reckless as to imply a willingness to injure or entire indifference to consequences," and that even treating the plaintiff as a bare licensee or trespasser the defense of contributory negligence by acting outside the scope of his employment does not enter into this case.

L. & N. R. R. v. Watson, 90 Ala., 68.

Lake Shore & Mich. R. R. v. Bedemer, 139 Ill., 536, Shearman and Redf. Law of Neg., Vol. 1, sec. 64.

"The mere fact that the plaintiff at the time he suffered injury from the negligence of the defendant was doing some unlawful act will not prevent a recovery unless the act was of such a character as would voluntarily tend to produce the injury."

Bailey on Master's Liability to Servants, page 415.

Now, if this is the law, under the evidence in this case the charge requested, which utterly ignores the fact that the defendant in error's going into the car was in no way connected with the wreck and injury, and leaves out the doctrine of proximate cause, the special prayer for instructions was not authorized.

In support of this proposition, and in fact the position taken in this case by the defendant in error throughout, and

as applying to nearly every phase of it, the attention of the Court is called to the following:

"Want of ordinary care must contribute to the injury as a proximate cause. The fault, want of due care or negligence on the part of the plaintiff which will preclude a recovery for the injury complained of as contributing to it, must be some act or conduct of the plaintiff having relation to that injury of a cause to the effect produced by it. To make good the defense upon the ground it must appear that a relation existed between the act or violation of law on the part of the plaintiff and the injury or accident of which he complains; and that relation must have been such as to have caused or help to cause the injury or accident, not in a remote or speculative sense, but in the natural and ordinary course of events as one event is known to follow or preclude another. It must have been some act, omission or fault naturally and ordinarily calculated to produce the injury or from which injury or accident might naturally and reasonably have been anticipated under the circumstances."

Bailey on Master's Liability for Injuries to Servants,
page 414.

There is another principle in this case which the defendant in error desires to present as bearing upon the sixteenth exception, as well as other points in the case:

"That though the plaintiff at the time of injury was not actually engaged in the service of defendant, yet if he was not at fault in respect to the collision and wreck, being injured, he is entitled to recover as any other person could rightfully on the train."

Wood on Master and Serv., page 779, sec. 404.

Reasoning from the position taken by the plaintiff in error's prayer for the first special instruction under exception sixteen ought not to have been given, because, if the

defendant in error was acting without the scope of his employment, he was not on this account a wrongdoer or trespasser under the evidence in this case; as the plaintiff in error contends, he was invited into the express car by the express messenger, who was in charge of the express car—was his lawful guest; he was rightfully on the train, and in no way responsible for the collision, wreck and injury. Under what principle of law or common sense then could it be said that he was not injured by the negligence of the defendant?

It can hardly be seriously contended under the evidence in this case that when the defendant in error was both baggage master and flagman, as alleged in the complaint and testified to by him (page 13, of the record), and not questioned in the entire case, that during the temporary absence of the defendant in error from his position in the baggage car, locking the door of the baggage car upon leaving it and stepping a few feet into an adjoining car in the presence of the vice-principal, that his employment had ceased. It seems to us that this would be straining the point too far when it is apparent that the rule which the plaintiff in error relies upon to keep the defendant in error perpetually in the baggage car while the train is making its way from one terminal to another was not promulgated for the protection of the employee. We seriously contend that there is no evidence in this case tending to show that the defendant in error was acting outside the scope of his duty. We do not understand that the enforcement of the principle of the rule preventing a recovery by an employee when he is injured outside the scope of his employment is an iron-clad, unreasonable proposition, but that the courts will view the surroundings and circumstances in determining whether or not the rules shall be applied.

It seems to us that a railway employee ought to be held liable for leaving his post only when he goes to a place of known and greater danger. If this had been a rear-end collision, the pullman car on the rear-end of the train would have been the most dangerous place. We contend that there

is just as much danger, and possibly more, from rear-end collisions as head-on collisions. An agent is just as liable to let a train into a block at the rear of a train, and more likely to do so, than to let two trains meet in a head-on collision. Again, it is a matter of common knowledge that a baggage car, with heavy trucks, packages, tools, boxes, lanterns, stoves and other articles, as the evidence shows was in this car, is one of the most dangerous places on a train of cars. The courts have so denominated them. So that there is no evidence in this case that the defendant in error left a *per se* safe place and voluntarily went into a *per se* dangerous place. So that, whenever the request for instructions made in this case assumed that the defendant in error left a safe place and went into a dangerous place there is no evidence to support such a charge. It is possibly true, under the evidence, that the express car was as badly wrecked and torn up as the baggage car; but, as we have said before, the defendant in error had no reason to believe that a wreck would occur. He had the right to assume that the plaintiff in error would not permit cars to meet in a head-on collision, and he had as much right to expect a rear-end collision as a head-on collision. And besides, there is not a line of evidence in this case indicating that the defendant in error would not have suffered serious injury in the baggage car.

In Elliott on Railroads, vol. 4, sec. 1631, it is said:

"A baggage car is a known place of danger. In this respect it differs from a cow-catcher and platform in degress. It is placed ahead of the passenger cars and next to or near the locomotive. In cases of collision it is the first car to give way to the shock, and frequently is the only one seriously injured. The danger from falling baggage in case of collision, derailment or sudden jerk is also probable."

Proximate Cause.

We call the attention of the Court to the case of *Burnett v. Roanoke Mills*, 67 S. E. Rep., at page 32. The defendant having pleaded and introduced evidence to show that the plaintiff was injured while acting in disobedience of the employees rules and outside of the scope of his employment. The court says in that case:

"The jury found as a fact under instructions from the court, which are sustained by the law, that the injury to the plaintiff was caused proximately by his own negligence, and this of course defeats a recovery in this action." So that it seems that the courts are unanimous upon the proposition that in order to defeat an employee on the ground that he was outside the scope of his duty or employment, the fact of *being outside of the scope of his employment must be the proximate cause of his injury*.

"In order to prevent a recovery the plaintiff's negligence must proximately contribute to the injury. If the sole immediate cause of the injury was the defendant's negligence the plaintiff can recover notwithstanding previous negligence of his own."

2 Wood's Railway Law, page 1262.

In Cleveland, etc., *Railroad Co. v. Ketchem*, reported in 19 L. R. A., page 339, the plaintiff Ketchem was not on duty as a mail agent at the time he was injured. He boarded one of the defendant's trains for the purpose of returning to his home. Instead of riding in the passenger car, as he had a right to do, he went into the postal car to ride, and the mail being very heavy that day at the request of the clerk on duty at the time the collision occurred, engaged in assisting the clerk in his duties. It was held that his presence in the postal car instead of a passenger car was not such negligence

as would defeat a recovery; the fact that plaintiff was in the express car, having nothing to do with the head-on collision which occurred, the collision being the proximate cause of the injury.

THERE IS NO EVIDENCE IN THIS CASE TENDING TO SHOW THAT DEFENDANT IN ERROR, AT THE TIME HE WAS INJURED, WAS OUT OF THE SCOPE OF HIS EMPLOYMENT IN RESPECT TO INTERSTATE COMMERCE.

All of the evidence in this case shows conclusively that on this particular trip all of the intrastate baggage was carried in the baggage car, that there was no interstate baggage on said train, and if there had been *it would have been carried in the express car* where defendant in error was injured. If defendant in error violated any rule of the company by leaving the baggage car and going into the express car, it was a rule solely applicable to and governing him in respect to *intrastate commerce*. If he was out of the scope of his employment, he was out of the scope of his employment in respect to *intrastate baggage* and *intrastate commerce*.

The Congress of the United States cannot and does not attempt to regulate the conduct and business of either the railroad companies or its employees in intrastate matters or commerce. *Howard v. Illinois Central R. R. Co.*, 207 U. S., 463. The foregoing prayer for instructions related as hereinbefore stated, of necessity under the evidence, to intrastate conduct as bearing solely upon intrastate commerce. If there had been a rule of the company expressly forbidding the defendant in error from going into the express car, while engaged in interstate commerce, nothing else appearing in this case, and the defendant in error in violation and defiance of said rules, and while in the performance of interstate duties, had gone into the said express car, and the going into said express car was the *proximate cause* of the injuries received by him, there might have been some ground for exception for the failure of the Judge to give the instructions

prayed for. But such was not the case as hereinbefore shown, and we contend, that if the Judge in the trial court, refused to give an instruction to the jury bearing entirely upon an *intrastate question*, with which the Act of Congress had nothing to do, that even though the said trial judge committed an error in refusing to give said instructions, and the Supreme Court of North Carolina affirmed the trial court as in this case, this Court cannot review the decision and action of the Supreme Court of North Carolina. And this argument, we contend, applies to all of the exceptions for the refusal on the part of the trial court to give the instructions prayed for by the plaintiff in error and to which it has excepted in this case.

The undisputed evidence in this case shows that all of the duties of defendant in error pertaining to intrastate baggage were confined to the baggage car, and that all of his duties pertaining to interstate baggage were confined to the express car, where he was injured. The plaintiff in error places itself in a most ridiculous attitude by trying to avail itself of the disobedience of a rule by the defendant in error which was, under the evidence, promulgated and enforced solely in respect to intrastate baggage and intrastate commerce, which the Federal Employers' Liability Act does not attempt to control.

All of the evidence shows that the defendant in error had in his charge no *interstate baggage*, and that at the time of the injury he was in no way engaged in interstate duties. He had in his custody only intrastate baggage. He had no interstate duty which required his presence in the baggage car or that required his presence in any special part of said train. Flagging was his only interstate duty outside the handling and care of interstate baggage, and certainly he was not outside the scope of his employment of flagging, as the train was in rapid motion. If the evidence is accepted in this case, if the defendant in error had been in the baggage car, in which alone intrastate baggage was carried, he would have

been out of the scope of his employment in respect to interstate commerce, and yet plaintiff in error asked the court to instruct the jury:

"That where an employee undertakes to do something not his duty to do, the master is not negligent; and if the jury shall find by the greater weight of the evidence that the plaintiff was acting outside of the scope of his employment when he was injured, they will answer the first issue 'No.'"

So that it is perfectly apparent that defendant in error had no interstate duty to perform at the time of the injury, was not engaged at the time in interstate commerce, and no Federal question could have been raised by any of the foregoing prayers for instructions; and yet the plaintiff in error in its brief solemnly declares that the defendant in error "had actually abandoned his post of duty."

It is folly to assert that the defendant in error *was not in the employment* of plaintiff in error simply because he left one car and went into another, or that defendant in error "abandoned his post of duty and went elsewhere to assist the employee of another company," etc., when defendant in error had no post of duty in respect to interstate commerce at the time of the injury.

WE CONTEND THAT THE ALLEGATIONS IN THE ANSWER DENYING THAT THE DEFENDANT IN ERROR WAS IN THE EMPLOYMENT OF THE PLAINTIFF IN ERROR WHEN HE WAS INJURED DID NOT RAISE THE QUESTION AS TO WHETHER AT THE TIME THE DEFENDANT IN ERROR WAS INJURED HE WAS ENGAGED IN INTERSTATE COMMERCE--THE DENIAL IS OF THE EMPLOYMENT AND NOT AS TO THE CHARACTER OF EMPLOYMENT. He was admittedly engaged, as far as was possible for him to be, in interstate traffic, *i. e.*, HE WAS ON THE TRAIN READY TO PERFORM ANY INTERSTATE BUSINESS THAT CAME TO HAND, AND IF HE WAS NEGLECTING ANY BUSINESS, OR OUT OF THE SCOPE OF HIS EMPLOYMENT, IT WAS SOLELY AS TO INTRASTATE BAGGAGE.

In summing up its contentions on page 37 of the brief, the plaintiff in error says: "At the time of the injury defendant in error had left his *post of duty*, in violation of the known rules of the company."

Where was the defendant in error's "post of duty"? In the baggage car? What duty did the defendant in error have to perform in the baggage car? We answer from the undisputed evidence *none*, except such as related to intrastate baggage. Where was the *post of duty* of the baggagemaster in the discharge of his interstate business? We answer from the undisputed evidence IN THE EXPRESS CAR, WHERE HE WAS INJURED.

Plaintiff in Error's Eighteenth Prayer for Instruction.

(No. 3, pages 97, 98 of the record). The plaintiff in error prayed the court for the following instruction, which was refused:

No. 3. "That as the plaintiff admits he was in the express car at the time of his injuries, and as the rules of the receivers of the defendant (of which he admits he had notice) required him to remain in the baggage car when not engaged in flagging the train, the burden is upon the plaintiff to satisfy the jury by the greater weight of the evidence that when he went into said express car, and was injured, he was engaged in the discharge of the duties of his employment, and if he has failed to so satisfy the jury you will answer the first issue 'No.' "

In effect, this was again an effort on the part of the plaintiff in error to shift the burden to the defendant in error on the issue of contributory negligence. Again we refer to the fact that the plaintiff in error admitted that the defendant in error was injured by its negligence.

If the going into the car in disobedience to the plaintiff in error's rules—and we contend that no such rule has been proven—has any relation to this case, it was purely a matter

of defense for the plaintiff in error, and the burden remained upon it through this entire trial to establish such defense under the *second issue*. Certainly this charge was in no way applicable or proper under the first issue. It is rather a new idea to us that defendant in error should be required to establish this defense for the plaintiff in error to the satisfaction of the jury. The plaintiff in error introduced the rules of the receivers, and proved by the defendant in error (on cross-examination) that he had notice of the same, and this was no part of defendant in error's case in establishing negligence and injury against him, but, as hereinbefore stated, was the plaintiff in error's *sole defense*.

We admit that where there is an injury to an employee, and the evidence on the part of the defendant shows that the employer had a rule covering the duty of the employee, and that the employer's rule had been brought home to the injured employee, and that the rule was in effect and had not been complied with by the employee at the time of the injury, the court should charge the jury that he could not recover *in case the violation of the rule contributed to produce the injury received*. White's Pers. Inj. on Railroads, Vol. 2, see, 843. But this is far different from the request of defendant.

The disobedience to the rules of the company, if the defendant in error did disobey any rule—which he denies—was not the proximate cause of his injury.

This is the clause upon which plaintiff in error contends that defendant in error violated the direct rule of the company:

"Remain in baggage car while on duty, EXCEPT WHEN REQUIRED TO TAKE THE PLACE OF THE BRAKEMAN."

This rule is preceded by the words "They must report for duty at the appointed time."

Now, in this connection, what is a proper construction of this rule? In the first place, when was he "on duty" in

respect to the spirit of this rule, and in respect to interstate commerce? Was there any reason for him to sit like a dummy in the baggage car on a through train between stops, when he carried all interstate baggage elsewhere, and when the train only stopped at long intervals? This the court will note is not one of the character of rules promulgated for the *safety of the employee*, but under its reasonable construction it simply means that the baggage master was to be on duty so as to be always ready to perform the same, and this not for his protection but to facilitate the business of the defendant. If this rule had been made for the safety of the employee it would have required him, while he was not receiving or discharging or checking up baggage, to retire into the rear passenger or Pullman car between stops. So we contend that if this rule is properly construed, the baggage man was on duty, even as to intrastate business, though he locked his door and went temporarily into the express car, where he carried all interstate baggage, and was near enough when his presence was required to transact the intrastate baggage business of the company and to promptly discharge all other business which required his actual presence in either the express or baggage car.

But, suppose again, for the sake of argument, we admit that the defendant in error violated a direct rule of the company; then and in that event we contend that the violation of said rule cannot be negligence *per se*.

Beach on Contributory Negligence, page 442.
Southern Ry. Co. v. Boston, 99 Ga., 798.

“It is only when the act is contrary to a statute, except in rare cases, that the court is warranted in saying that the violation of a rule of the master by the servant constitutes negligence *per se*.¹⁰”

Galveston Railroad Co. v. Sweeney, 14 Tex. Civ. App.,
page 216.

Missouri K. & T. R. Co. v. Mayfield, 29 Tex. Civ. App., page 477.

Again, the violation by an employee of a rule of his employer is not negligence *per se*, but is merely evidence for the consideration of a jury.

Missouri, etc., R. Co. v. Pawkett, 28 Tex. Civ. App., 583.

San Antonio R. Co. v. Connell, 27 Tex. Civ. App., 533.

Lake Shore & Mich. S. R. Co. v. Parker, 131 Ill., 557.

And, stronger than this, it has been said by the court "that if the violation of a rule of a company is relied on to contribute to the injury of plaintiff, the violation of the rule *must occasion or be connected with the injury* to bar a recovery by the employee."

White on Personal Injuries on Railroads, Vol. 1,
sec. 90.

Pittsburg C. C. & L. Co. v. Lighthimer, 78 N. E. Rep., 1033.

Habitual Violation of Rule.

But even admitting, for the sake of argument, that this was a reasonable rule that the plaintiff in error's construction thereof is correct, *i. e.*, that the defendant in error should stay in the baggage car and go on no other part of the train during his entire run, and that in open violation of this rule he went into the express car, and but for his going into the express car he would not have been injured, then we contend, under the evidence, that if, as the plaintiff testified, "the baggage was often carried in the express car, and that this was known to the officers of the road, that they always used an express car for through baggage to save transferring it at

Hamlet, and were directed to do so by those in charge" (page 14 of the record), that this violation of the express rule with the knowledge, consent and direction of the officers of the company and those in charge *abrogated said rule*, and defendant cannot be heard to say in this case that plaintiff was injured in direct disobedience of the rule.

Biles v. Railroad, 139 N. C., 528.

The above case of *Biles v. Railroad* enunciates the principle that where a rule is habitually violated to the knowledge of the employer, or when the rule has been violated so frequently and openly and for such a length of time that the employer could by the exercise of ordinary care have ascertained its non-observance, the rule is considered as waived or abrogated. This principle is so well settled that we think that no further reference need be made thereto. However, we desire to call the attention of the court to the case of *Haynes v. Railroad*, 143 N. C., page 154, in which the court says: "The principle that the violation of a rule made by the employer for the employee's protection and safety, when the proximate cause of such employee's injury, does not obtain when the rule is habitually violated to the knowledge of the employer, when the rule has been violated so frequently and openly for such a length of time that the employer could, by the exercise of ordinary care, have ascertained its non-observance."

Disobedience by an Employee of a Known Rule of an Employer Will Not Prevent a Recovery for Injury by the Employee Unless the Violation of the Rule Was the Proximate Cause of the Injury.

"The fact that the master has established rules and regulations for the government of its servants in the use of machinery or appliances for the use in the business, and that the

servant was acting in known violation thereof at the time the injury was received, will not excuse the master from liability unless such violation of the rules in whole or in part contributed to the injury."

Wood on Master and Servant, page 774, sec. 399.

Reed v. Burlington, etc., R., 72 Iowa, page 170.

Thompson's Com. on Law of Neg., Vol. 5, sec. 5491.
Texas, etc., R. Co. v. Mayfield, 15 Tex. Civ. App.,
 553.

"In order to defeat a recovery for an injury arising from the servant's disobedience of a positive order of the master, such disobedience must be the promoting cause of the injury."

Ibid, pag 778, latter clause of sec. 402.

And so, if for the sake of argument we admit that the rule is a reasonable one, that the plaintiff in error's construction thereof is correct, that the rule has not been abrogated, and that the defendant in error in disobedience to the rule went to the express car, and while in there was injured, yet we contend that unless his going into the baggage car was the proximate cause of his injury he is still entitled to recover for the injuries sustained.

Brewster v. Elizabeth City, 137 N. C., page 392.

Russell v. Monroe, 116 N. C., page 720.

Manly v. Wilmington, 74 N. C., 655.

Wabash, etc., R. Co. v. C. Trust Co., 23 Fed., 738.

Rule Abrogated by Vice-Principal.

For the sake of argument we advance one step further. If we should admit that the rule is a reasonable one, that the plaintiff in error's construction thereof is correct, and that the defendant in error in direct disobedience to the rule

entered the express car, and while in there was injured, and that going into the express car was the proximate cause of the injury, yet we earnestly contend that the defendant in error in this case would be entitled to recover because *of the direction or order on the part of the conductor to the defendant in error to go into said car*, under the evidence, undisputed and uncontradicted in this case. (Page 14 of the record). This principle is thoroughly established in *Mason v. Railroad*, 111 N. C., 486, in which the court says:

"A rule of a railroad company agreed to by the plaintiff (an employee) may be waived or abrogated for the company by the conductor making an order contrary to such rule, when it was the duty of the plaintiff to obey such order." "The conductor has entire control and management of the train to which he is assigned," says Justice Field in *Railroad v. Ross*, 112 U. S., 377, cited in the above case of *Mason v. Railroad*.

In *Jacobus v. St. Paul, etc., R. Co.*, 20 Minn., 134, it is held:

"Still, again, admitting that the plaintiff was cognizant of the rule of the company excluding passengers from the baggage car, and that he persisted in remaining there without the permission or consent, yet with the knowledge of the conductor, and was guilty of negligence in so doing, this negligence will not prevent his recovering unless it were contributory to the injury received. To be thus contributory, in a legal sense, it must be a proximate cause of the injury—that is, it must have been near in the order of causation (Sher. & Redf. on Neg., 37, 38)—and it must have contributed to some extent directly to the injury, and must have been not a mere technical or formal wrong contributing either incidentally or remotely, or not at all, to the injury. Now, notwithstanding the fault or negligence of the plaintiff in remaining in the baggage car and admitting that the baggage car was a place

of greater danger than the passenger car, and that the plaintiff would not have been injured if he had not been in there, his presence there with the knowledge of the conductor made it defendant's duty to exercise care to avoid injuring him while there; and if injury resulted from want of such care, *i. e.*, negligence on defendant's part, such negligence, and not plaintiff's fault in being in the baggage car, would be the immediate and direct—the more proximate—cause of the injury, and defendant would be responsible for the same."

Under the reasoning in the foregoing cases, we take the position that there being no positive rule forbidding the defendant in error from going into the express car, and by going in there he could only disobey the rule *by implication*, that his going into the express car and being in the express car at the time of the accident in the presence of, and with the knowledge of, and with the concurrence and permission of the conductor, the vice-principal, that though the conductor had not *told* him or *ordered* him to go into the express car, the rule, if such existed, was abrogated, the plaintiff was where he had a right to be, his going in there had nothing in the world to do with the collision, the principal (his employer) owed him a duty at the place where the vice-principal was himself and where the plaintiff was by the permission of the vice-principal; and further had no duty to perform elsewhere in respect to interstate commerce.

Now, on the other hand, as we contend, if this defendant in error had been forbidden to go into the express car by the rules of his company, and in direct violation of such law and without the intervention of a vice-principal or the facts bearing upon the abrogation of such a rule he had kicked over a box of dynamite and produced a wreck in which he was injured, then he could not have recovered, because his violation of the rule in going into the express car would be the proximate cause of the accident and of his own injury.

This prayer for instruction the judge could not give for the further conclusive reason: there was no rule introduced in evidence which required the baggagemaster "*to remain in the baggage car when not engaged in flagging the train.*" The only rule introduced in reference to this point reads as follows (page 46 of record):

"No. 664. They (baggagemen) must report for duty at the appointed time; *remain in baggage cars while on duty, except when required to take the place of brakeman.*" There is not one word in said rule in reference to flagging the train. It is true that defendant in error had upon him two separate duties—*that of baggagemaster and flagman* (page 13 of record). If the defendant in error was held to strict observance of the rule which plaintiff in error is attempting to enforce against him he would have to *flag the train while remaining in the baggage car.* It seems that the plaintiff in error in preparing its prayers for instructions got the duties of defendant in error and the rule "a little mixed."

In *Vanderbilt v. Brown*, 128 N. C., it is held:

"Where part of a requested instruction is erroneous, the court may refuse to give the instruction."

Hampson v. Railroad Co., 120 N. C., 534.

In *State v. Neal*, 120 N. C., 620, it is held:

"There was no aspect of the evidence tending to show an accidental killing. If the rest of the prayer was correct, it being incorrect as an entirety, the court was not called upon to dissect it and give so much as was good."

Plaintiff in Error's Twentieth Exception for Refusal of Judge to Give Special Prayers for Instructions.

The plaintiff in error requested the trial judge to give the jury the following instructions (page 76 of the record):

"Although the jury find that the plaintiff, in fact, went into the express car at the request of the conductor, yet unless they shall further find by the greater weight of the evidence that he went because he thought it was his duty to go in obedience to the conductor's orders and not because he was being invited to go to gratify his idle curiosity, the jury will answer the first issue 'No.' "

This exception, we contend, is hardly worth considering. It strikes us as *puerile*. In the first place, there is no evidence that the defendant in error "went into the express car at the request of the conductor." The conductor was the superior, the vice-principal, and in control of the train. The defendant in error was a subordinate and bound to obey him. The evidence shows that the conductor said to defendant in error, "Come, go with me and see what he wants" (page 27 of record). This was the *command* of a superior, the vice-principal. Capt. Wrenn, a witness for plaintiff in error (at page 46 of record) testified: "The baggageman is under control and direction of the conductor while on the train. He is bound to obey his orders. It was the duty of the baggageman to go into the express car when directed to do so by the conductor. The conductor had a right to order the baggageman on any part of that train, at any and all times."

How could the jury be expected to divine the thoughts of the defendant in error. If he was ordered to go into the express car by the conductor (and the undisputed evidence shows that he was), it was his duty to go, no matter what he thought. The command of the superior *produced or originated the duty*.

Again, there is not a line of evidence in this entire case that tends to show that the defendant in error was *invited* to go into the express car to *gratify his idle curiosity*. Whoever heard of an employee being invited to go into a place by the master to *gratify his (the employee's) idle curiosity?* The request for instructions upon its face is simply ridiculous. Defendant in error contended that he went into the express

car in obedience to the order of the conductor. Plaintiff in error contended that defendant in error went into the express car to assist the express messenger. Nobody ever contended that defendant in error went into the express car to "satisfy his idle curiosity." And so this request is based upon a vague idea that has been conjured up outside the evidence in this case, and the court will note that this exception and all others are directed to the first issue, of negligence, when the plaintiff in error had already in its answer admitted negligence, and is an attempt, after knowing that the judge had charged that the burden of establishing negligence was upon the defendant in error, to also compel him to establish plaintiff in error's defense of contributory negligence. This request for instructions also erroneously ignores the doctrine of *proximate cause*, the abrogation of the rule as shown by the undisputed evidence, and assumes that the defendant in error abandoned a *per se* safe place and went to a *per se* dangerous place; and further that his going into the express car was a wrongful act.

The Plaintiff in Error's Twenty-first Exception to the Refusal of the Trial Judge to Give Special Prayer for Instructions. (4)

The plaintiff in error requested the trial judge to give the following instructions to the jury, which he refused:

6. "The admitted rules of the receivers of the defendant required the plaintiff to remain in the baggage car when not engaged in flagging the train, and the plaintiff had no right to go into the express car in violation of the provisions of the said rules, unless the conductor ordered him to do so for the purpose of discharging some of the duties of his employment; and unless the jury shall find by the greater weight of the evidence that when the conductor told the plaintiff to go with him into said car, he thereby understood that the conductor

wished him to go to discharge his duties as an employee of the defendant, the jury will answer the first issue ‘No.’”

The plaintiff in error in this request for instructions again fell into the error of misquoting the rule for the government of baggagemen, as stated in our argument under exception No. 18 (3). There was no rule in reference to “flagging the train,” and the argument and authorities under that head, *supra*, are intended to apply here upon this phase of the exception. We do not desire to repeat principles and requote authorities in this brief. This prayer for special instructions embodies all of the faults of the prayers for instructions under the 18th and 20th exceptions. But we again call the attention of the court to the testimony of plaintiff in error’s witness who testified (on page 46 of record): “The baggage-man is under control and direction of the conductor while on train. *He is bound to obey his orders.* *The conductor had a right to order the baggage-man on any part of that train, at any and all times.*” So defendant in error could not have questioned the “purpose” of the conductor. If the defendant in error *understood* the conductor to tell him to *go with him into the express car, that was enough; it was his duty to go.* In this request the plaintiff in error states that the admitted rules of the plaintiff in error required the baggageman to remain in the baggage car when not engaged in flagging the train. We have already in this brief discussed the construction of this rule. If defendant in error had not remained on the train at all, but had gotten off at the last stop before the wreck, it would have probably been better for him. The plaintiff in error in its requests for instructions assumes that the defendant in error had no right to go into the express car; that this was a violation of the provisions of a *rule*. We deny that there is any evidence forbidding him to go into the express car or any part of the train, and the plaintiff in error only gets this idea by drawing its own inference under its own construction of the rule which is recited. In its request it

again totally ignores the uncontradicted evidence in the case on page 14 of the printed record that this rule requiring him to remain in the baggage car had been abrogated, and that to the knowledge of the officers of the road, and that he had been directed to use the express car in his business by those in charge of the business. The exception further rests the entire rights of the defendant in error upon a finding of the jury upon what he understood the conductor wished him to do as employee of the plaintiff in error. Under the evidence referred to just above, with nothing else tending to show the conversation between the conductor and the defendant in error, could the jury say what the defendant in error understood, other than what the conductor said? And again, in this exception, the plaintiff in error ignores the doctrine of proximate cause, and assumes that the express car was *per se* dangerous.

Plaintiff in Error's Twenty-fifth Exception.

The trial judge, among other things, charged the jury as follows:

"Was the plaintiff injured by the negligence of the defendant? Now, the burden of that issue is on the plaintiff, and the plaintiff must satisfy you by the evidence and the greater weight thereof that he was injured by the negligence of the defendant, and that the defendant's negligence was the proximate cause of his injury. Gentlemen of the jury, in passing on that issue, as I said, defendant admits its negligence, but denies that its negligence was the proximate cause of the plaintiff's injury, and contends that the proximate cause of the injury was his going into the express car and not the negligence of the defendant. If you find from the evidence and the greater weight thereof, the burden being on the plaintiff, that the plaintiff's injury was caused by the defendant's negligence, proximately caused, you should answer the first issue 'Yes.' If you do not so find, you should answer it 'No.'"

We can see no error in this charge. Under the plaintiff in error's eighteenth exception we have gone fully into the question of proximate cause, and rely on the argument therein used and the authorities there quoted to meet this exception. This part of the charge must be taken with all of the balance of the charge, and it will be seen that no harm could have come to the plaintiff in error therefrom.

Plaintiff in Error's Twenty-sixth Exception.

The trial judge, among other things, charged the jury as follows under the issue of contributory negligence:

"Was the plaintiff's injury caused by his contributory negligence? Contributory negligence is such an act or omission on the part of the plaintiff amounting to a want of ordinary care, as—concurring and co-operating with some negligent act or omission on the part of the defendant—makes the act or omission of the plaintiff the proximate cause or occasion of the injury complained of. Proximate cause means direct cause—that cause which produces the result without any other supervening cause bringing about the injury. If you find from the evidence that the plaintiff had no right to go into the express car; that he was not where he should have been, and you further find that he would not have been injured but for his going into the express car, and that his going into the express car was such an act on his part that a reasonably prudent man ordinarily would not have done under the circumstances of the situation, then he would be guilty of contributory negligence, and it would be your duty to answer the second issue 'Yes.' If you do not so find, it would be your duty to answer the second issue 'No.'"

Under all of the evidence in the case, the judge should have charged the jury that defendant in error had the right to go on any part of the train; that if he carried interstate baggage in the express car he had the right to go there; that

there was no rule in evidence forbidding him to go into said car; that if the conductor ordered him to go into said express car it was his duty to obey him; that his going into the express car was not the proximate cause of his injury. But the judge made the charge more favorable to plaintiff in error than the law and facts authorized, and placed the lawfulness of his going into the express car upon the *right* to go into said car, and placed him upon the footing of the "prudent man." What more could he have done for the plaintiff in error, unless he had charged the jury that the act of the defendant in error's going into the express car was negligence *per se*; and this he could not do under the evidence in this case and the law governing such evidence. We do not desire to repeat, and this view of the case is fully argued elsewhere in this brief, and authorities cited.

Applying to All the Foregoing Exceptions.

In all of the foregoing exceptions, the plaintiff in error's prayers for instructions put the sole question of defendant in error's right to recover upon the question of his *going into the express car to assist the express messenger*. Now, the only wrong that the defendant in error could possibly have done in going into the express car for the purpose named, in so far as the plaintiff in error is concerned, would be in the possible disobedience to the rule requiring him "to remain in the baggage car while on duty." This instruction would have been clearly erroneous, as it would have come conclusively under the issue of *contributory negligence* in disobedience to the rules of the master by the employee. We again refer to the cases: Beach on Contrib. Neg., page 442; *Southern Ry v. Boston*, 99 Ga., 798; *Galveston Ry. v. Sweeney*, 14 Tex. Civ. App., page 216; *Missouri, K. Tex. R. Co. v. Mayfield*, 29 Tex. Civ. App., page 447; *Missouri, etc., R. Co. v. Parkett*, 28 Tex. Civ. App., 583; *San Antonio R. Co. v. Connell*, 27 Tex. Civ. App., 532; *Lake Shore & M. S. R. Co. v. Parker*,

131 Ill., 557; White on Pers. Inj. on Railroads, Vol. 1, sec. 90; *Pittsburg C., C. & L. R. v. Lightheimer*, 78 N. E. Rep., 1033; Thompson's Com. on L. of Neg., Vol. 5, sec. 5491.

In all of the foregoing prayers in respect to violation of rules as construed by the plaintiff in error, we call the attention of the court to the fact that the rule barring a recovery on account of a violation of such rule, when such is the proximate cause of the employee's injury, must be one *made for an employee's protection and safety*. *Biles v. Railroad*, 139 N. C., 528. This rule, as hereinbefore stated, which we contend, under the undisputed evidence in this case, was abrogated, was not made for the employee's protection and safety, but was made solely to further the business interests and convenience of the plaintiff in error. It seems that the plaintiff in error is mixed on the "disobedience of a known rule" and "scope of employment."

In reply to the exceptions contained herein, in reference to the position of the defendant in error at the time he was injured, as embodied in the special requests for instructions, we refer the court to the following:

In *Carroll v. New York & N. H. R.*, 1 Duer's Rep. (New York), 571, it is held:

"A passenger injured by two trains of cars running in opposite directions, coming in collision, is entitled to recover, although at the time of the collision in an apartment of the baggage car, if lawfully there; notwithstanding he knew the position to be much more dangerous, in the event of such a collision, than a seat in the passenger car, and that, too, though the result may demonstrate that he would not have been injured if he had been in a passenger car.

"In that case his imprudence or want of care does not contribute to cause the accident, which occasioned the injury.

"A passenger, in selecting his seat, if lawfully in the one selected, owes no duty to a railroad company requiring him to select one with a view to diminish the hazards that may attend an act of gross negligence on the part of their agents in the running of the trains; nor does any indiscretion in selecting it exonerate the company from liability for injuries resulting from a collision caused by the gross negligence of their agents.

"If a collision thus occurs, a passenger who is injured by it may recover if, as between him and the company, it was lawful for him to be where he was at the time of the collision, as his being there did not tend directly or remotely to produce the act of occurrence which caused the injury.

"He had not failed to perform any duty owing by him to the company, and, as between him and it, he was not guilty of any negligence.

"He took a seat in the postoffice department of the baggage car. The position was injudiciously chosen, and may be assumed to have been known to him to have been a far more dangerous one than a seat in a passenger car. But he took it with the assent of the conductor. He was not there as a trespasser, or wrongfully, as between him and the defendants. So far as all questions involved in the decision of this action are concerned, he was lawfully there. He being there was not such negligence, in the legal sense of the term, as exonerates the defendants from the consequences of injuring him by such culpable negligence as consists in running two trains of their cars so violently into each other as to entirely demolish the car in which he was sitting."

In *Webster v. Rome, etc., R. Co.*, 115 N. Y., it is held:

"Plaintiff took a seat in a passenger car, where there was plenty of room; he afterwards went forward into the baggage car to smoke, and was there at the time of the collision. The evidence tended to show that the passenger car was a safer place than the baggage car. Defendant claimed that the plaintiff, in going into the baggage car, was guilty of such negligence as barred a recovery. Held untenable; that if plaintiff's presence in that car, although unauthorized, in no way contributed to the injury, it furnished no defense, and that the question was properly submitted to the jury."

In *Washburn v. Nashville, etc., R.*, 75 Am. Dec., 785, it is held:

"A person riding free and in baggage car of train, with knowledge of the conductor, is not, by reason of such facts, precluded from recovering for an injury caused by a collision, even though he might not and would not have been injured if he had remained in the passenger car."

In Redfield on Railways, pages 331-332, it is held:

"One being in the baggage car with the knowledge of the conductor will not preclude him from recovery from an injury caused by a collision, even though he might or would not have been injured if he had remained in the passenger car." Citing *Phila. & Reading R. Co. v. Derby*, 14 How. (U. S.), 468.

In Thompson Com. on Negligence, Vol. 5, sec. 5614, it is held:

"In considering the fault of a railway trainman or other servant in an improper place or position

upon the train as contributory negligence, it is necessary to keep in view the principle that such fault does not bar a recovery of damages in case he is injured by so riding, unless it is the proximate or direct cause of the injury. If the fact of his being out of his proper place or position did not contribute to bring about his injury, then it is, of course, irrelevant."

See. 5619. "Nor does the law attempt to discriminate nicely as to the propriety of the place or the position of the conductor of a railway train who is killed or injured in a collision or by a derailment. Although his place may, under the rules of the company, be in the middle of the train, yet if he is killed in the derailment of the engine and some of the cars while forward warning the engineer to look out for certain obstructions ahead, contributory negligence will not be imputed to him, though he would not have been injured had he remained in the middle of the train."

Sec. 5448. "The failure of the conductor, whose duty calls him to all parts of the train, to see that the rear brakeman is in the cupola of the caboose, is not such contributory negligence as will prevent a recovery for an injury caused by the company's negligence, although it may have been avoided if the brakeman had been in his place." Many cases cited.

Sec. 5449. "The fact that the train conductor left the cars and rode on the engine is not contributory negligence, as a matter of law, but the question of his negligence is for the jury."

Sec. 5451. "It is also his duty to see that the rules and orders for the government of other employees under his control are obeyed."

Sec. 5617. "If a man is middle brakeman he may ride on other portions of the train than in the cars or on top of them. The courts do not make nice distinctions as to where a brakeman shall be."

In Thompson on Neg., Vol. 3, see. 2958, it is held:

"Upon the question whether contributory negligence is to be ascribed to a passenger who is hurt while riding in the baggage or express car, under such circumstances that he would not have been hurt if he had remained in a passenger car, there is a considerable conflict of judicial opinion. It is no doubt a reasonable regulation that passengers shall not ride in the baggage car. Moreover, all passengers are probably aware that the hazards of travel are increased by riding in this portion of the train. *Prima facie*, therefore, a passenger who, unless excused by special circumstances, elects to ride in the baggage car instead of remaining in one of the passenger coaches—assuming that there is room for him there—commits an impropriety of such a character that, in case he is injured while so riding, and the circumstances are such that he would not have been injured if he had remained in one of the passenger coaches, he will be precluded from recovering damages from the company, unless it appears that he is riding there by permission of the conductor for the benefit of the company. If, on the other hand, the fact of his taking this improper position does not increase his danger in respect of the accident in which he is injured; in other words, if his injury is not due in whole or in part to that fact, then there is no causal connection between his negligence or improper act and the hurt which he has received, but the responsibility must be attributed entirely to the negligence of the carrier, if negligence there be. That is to say, if the fact of his being in the baggage car is not, in whole or in part, the cause of the injury which he receives, it will not prevent him from recovering damages."

Sec. 2959. "It has been held that a railway postal clerk is not imputable with contributory negligence because of his riding in the mail car, although he is not on duty at the time, in the absence of any rule of the company forbidding him to do so; and this is especially so where he is riding for the purpose of rendering voluntary assistance to another mail clerk in the assortment and distribution of his mail."

In *Cody v. New York, etc., R. Co.*, 24 N. E. Rep., 402, it was held :

"In an action against a railway company for personal injuries it appeared that plaintiff took his seat in the smoking compartment of the baggage car; that he did not notice that the train had started until it was fairly under way, and then, from his knowledge of the time of running the trains, knew there was serious danger of a collision. He went into the baggage car, stood at the door ready to jump should there be danger of a collision, and did jump just before the train collided. *Held*, not contributory negligence.

"The fact that he went into the baggage car, where passengers were not allowed to go, did not show negligence, though it appeared from his own admission that he knew that the rear end of the train was the safest.

"Even if all the passengers in the cars, who remained in their seats, in ignorance of the impending danger, had escaped without injury, it would not be conclusive that the plaintiff was guilty of negligence in going into the express car, or had recklessly or unwisely misjudged what was prudent for him to attempt.

"The prudence of the plaintiff's conduct is not necessarily to be tested by the results of the accident to others in a different position. Even if it were, as

the case reported shows that serious injury did result to those who were sitting or moving in those parts of the train appropriated to passengers, it is entirely possible that plaintiff would have sustained more serious injury if he had remained in his seat, or had attempted to reach the end of the rear car, than he did by his action. The question whether the plaintiff acted with due and reasonable care under all the circumstances was one peculiarly for the jury, and was submitted under proper instructions."

In *Wagner v. Missouri P. R. Co.*, 3 L. R. A., 156, it is held:

"Taking an improvised seat made by a plank across empty kegs on a flat car next to the engine, upon a special train, and remaining there after a request from the conductor to go into the box car, to which the passenger replies that he wants to ride on the flat car and see the country, on which the conductor says nothing more, is not such negligence, as a matter of law, as will prevent recovery for the death of the passenger in consequence of the derailment of the train, caused by negligence in its management, although if the passenger had been inside the box car he might not have been killed. But it is a question for the jury whether an ordinarily prudent man could have reasonably anticipated that by taking that position he was exposing himself to the injury received, and also whether the conductor consented to his remaining there; and, if so, whether the train was managed with the care and caution commensurate with the passenger's risk in that situation, and whether his injury was or was not the direct and immediate result of the company's failure to discharge that duty."

Baltimore & O. R. Co. v. State, etc., 6 L. R. A., 706, was a case in which one Wiley, a postal clerk, entered the smoking-car of the train of plaintiff at Baltimore and rode to Washington. He was not on duty at the time. After leaving Washington, he went into the postal car, and there remained until the head-on collision, which resulted in his death. The court says:

"Here the deceased was doing what he was actually required to do for the larger part of his time on the cars, and was permitted to do the rest of the time when on the cars. It was provided for his occupancy when on duty as postal clerk, and his not being on duty did not make the car more dangerous to him. His act, therefore, in no way contributed to the result which happened." Citing *Creed v. Pa. R. Co.*, 86 Pa. St., 139.

Meloy v. Chic., etc., R. Co., 4 L. R. A., was a case in which the plaintiff, a civil engineer of the road, was riding in a tool car on a wrecking train instead of the rear car for passengers. The train derailed and he was injured. It was held:

"Such engineer was not guilty of contributory negligence, as a matter of law, in riding in a tool car near the engine instead of in the way car at the rear end of the train, although in the accident from which his injuries resulted the rear car was not derailed and he would not have been injured had he been in it, where it is shown that the train was sent out with a wrecking crew for the purpose of replacing a derailed engine; that the way car was no better adapted to the use of travelers, and was less convenient than the tool car, which contained accommodations for the wrecking crew, and which was, in fact, occupied by some of them during the trip; and that he rode in it with the knowledge of

the conductor — especially where some evidence tends to show that during that trip he was one of the wrecking crew."

While it is true, as stated in the brief of the plaintiff in error, the defendant in error obtained a judgment for thirty thousand dollars, there is no evidence that the verdict was excessive.

If there ever was a case of physical and mental suffering and agony that called for a verdict in a sum greater than the amount allowed, this was the case. Application to set aside the verdict as excessive was made and urged before a considerate and well-balanced trial judge, who heard all of the evidence, witnessed the physical examination of the defendant in error before the jury by eminent surgeons and physicians, and who had him under his observation for a whole week, and this judge refused to disturb the verdict; and if the verdict had been for ten thousand dollars more than it was, we do not candidly believe that there is a single judge on the bench in the State of North Carolina that would have disturbed the verdict.

The defendant in error contends that this case was fairly submitted to and tried by an intelligent, unprejudiced and unhampered jury. The defendant in error, in healthful young manhood, with all this can mean to one of God's intelligent creatures, endowed with hope and bright prospects, has, by recklessness and negligence, been transformed into a mass of quivering nerves and aching bones—a helpless, hopeless and dependent cripple, living and to live on perhaps for many years dead to everything but excruciating pain and melancholy; with the grim specter ever by his side urging him to undergo an operation which offers him only one chance in one hundred, and yet he—poor wreck that he is—so loving life, clings to the little certainty which is promised in a half-dead body.

No man can truthfully say, under the evidence in this case, that the sum allowed was even commensurate to the injuries

sustained. What is thirty thousand dollars now in comparison with thirty thousand dollars even ten or fifteen years ago? Money, under existing circumstances and surroundings, is cheap, and verdicts, of necessity, will be larger than they have been in the days when money was costly. There can be no right to question this verdict in this Court, save upon questions of law, or to even intimate to the Court that the verdict is excessive, when its appeal has already been made to the sworn officer of the law, who alone could hear them in this respect, and whose determination in said motion is conclusive, even upon this Court.

In concluding this brief, we desire to say that it will appear from the examination of the evidence and the judge's charge, and in fact everything in connection with the trial of this cause, considering the fact that in the first complaint filed herein there was practically no defense set up, that the main effort on the part of plaintiff in error has been to delay the payment of this just and righteous judgment on the ground of some technicality or fine-spun theory.

There is no alleged error here upon the question of damages, and, briefly summed up, the defendant in error contends that the plaintiff in error admitted its negligence in its answer, that the undisputed evidence shows the gross negligence of the plaintiff in error; that the defendant in error under the evidence had a right to go at all times upon any part of this train; that there was no rule forbidding him to do so, and if there ever was, that said rule had been abrogated; that he was ordered into the express car by the conductor; that no act on his part to any extent brought about, induced or aided in the said wreck, or was proximately or remotely the cause of his injury; that the defendant in error was not out of the line of his duty or the scope of his employment in respect to either intrastate or interstate commerce, as he had no duty to perform at the time of the injury; that this cause was tried by a fair and impartial judge and a deliberate and

intelligent jury, who were duly cautioned by the judge; that the jury allowed the plaintiff, after hearing the evidence and witnessing his physical examination by eminent surgeons, a reasonable sum for his injuries.

Respectfully submitted,

WILLIAM C. DOUGLASS,

Attorney for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1881.

SEABOARD AIR LINE RAILWAY,
Plaintiff in Error.

vs.
ERNEST DUVALL,
Defendant in Error.

No. 284.

BRIEF OF PLAINTIFF IN ERROR.

HILARY A. HENKIN,
BENJAMIN MICOU,
RICHARD P. WHITELAY,
WALTER H. NEAL,
E. T. CANTLER,
Counsel for Plaintiff in Error.



Microcard Editions

An Indian Head Company

A Division of Information Handling Services

CARD 4

SUBJECT INDEX.

	Page
Present Status of Case	1
Statement of Case	2-12
Specifications of the Errors Relied On	12-21
Argument	21-75

SUB-HEADS.

Errors in the Admission and Rejection of Testimony	21-22
Assignment 12	22-23
Errors in the Instruction of the Court	23-25
I. Plaintiff Not Being Employed by the Defendant in Interstate Commerce at the Time of His Injury can not Recover Under the Employers' Liability Act	25-40
II. Where a Servant Departs from the Sphere of His Assigned Duties the Relation of Master and Servant is Temporarily Suspended and His Position Becomes that of a Trespasser and not an Employee of the Defendant	40-42
III. The Plaintiff Being Guilty of Contributory Negligence in Leaving His Post and Going Into a More Dangerous Place on the Train Contributed the Proximate Cause of the Injury and was therefore not Injured as the Result of the Defendant's Negligence	42-69
(a) The Plaintiff having Departed from the Sphere of His Assigned Duties, the Relation of Master and Servant was Suspended and the Defendant Consequently Owed Him No Greater Duty than It Owed a Trespasser or a Bare Licensee .	53-69
Excessive Damages:	
Exception 27	69
Decision of the Supreme Court of North Carolina was Based upon an Erroneous Conception of the Testimony as the same Appeared in the Record	69-75

CITATIONS.

	Where cited Page
Abend vs. Railway Co. 111 Ill. 202	48
Allen vs. Hixon (Ga.) , 36 S. E. 810	55
17 Amer. Neg. Rep. 435-441	48
20 Amer. Neg. Rep. 671	51
Atchison, T. & S. F. R. Co. vs. Rusman , 60 Fed. Rep. 377-8 .	31
Atlanta & Charlotte Air Line Railway vs. Ray , 70 Ga. 678-9 .	50
Bailey vs. Railroad , 149 N. C. 169	53
Bailey on Personal Injuries (1912), 2d ed. Vol. II, p. 1405	44
Bailey on Personal Injuries (1912), 2d ed. Vol. II, pp. 1406-7 .	45
Bailey on Personal Injuries, Secs. 3332-3398a	48
Bailey on Master's Liability for Injuries to Servant, p. 414	46
Bear vs. R. R. 98 Ala. 586	28
Bryan vs. Railway (Texas) , 90 S. W. 693	61
Central Railroad vs. Sears , 61 Ga. 279	50
Connors vs. B. C. R. & N. R. Co. 74 Iowa, 382	48
Chatt. Ry. Co. vs. Myers (Ga.) , 37 S. E. 439	51
Dean vs. Railroad , 99 Ala. 586	37
1 Dresser Employers' Liability Acts, Sec. 13	28
1 Dresser Employers' Liability Acts, Sec. 104	63
Doggett vs. Railway Co. 34 Iowa, 284	48
Duvall vs. Packing Co. (Mo.) , 95 S. W. 978	57
3 Elliott on Railroads, 2d ed. Sec. 1303	42
3 Elliott on Railroads, 2d ed. Sec. 1313, pp. 763-4	35
Federal Employers' Liability Cases , Supreme Court Dec. of January 15, 1912	3, 5, 9, 39
Emerson vs. St. Louis & H. Ry. Co. 111 Mo. 161; 19 S. W. 1113	3
Filbert vs. N. Y. N. H. & H. R. Co. 184 N. Y. 522	50
Freeman vs. Brewing Co. (Texas) , 90 S. W. 1165	61
Green vs. Brainerd & A. M. Ry. Co. 34 Iowa, 284	48
Green vs. Railway (Minn.) , 88 N. W. 975	59
Gross vs. Lumber Co. (La.) , 43 So. 1006	64
Hancock vs. Railroad , 124 N. C. 222	5
Howard vs. Ill. Cen. R. Co. 207 U. S. 463	26
Inhabitants of Peru vs. Barrett , 60 A. 968; 100 Me. 213	3
Kepner vs. United States , 195 U. S. 100; 49 L. E. 120	38
Kennedy vs. Chase (Cal.) , 52 Pac. 33	60
2 Labatt, Sec. 629	41
2 Labatt, Sec. 635	46
Lehigh Valley R. Co. vs. Greiner , 113 Pa. St. 600	48
2 Labatt, Master and Servant, Secs. 719-720	27

Lemon, Adm'r <i>vs.</i> L. & N. R. Co. (Ky.), 125 S. W. 702-3	4
Lindquist <i>vs.</i> Plaster Co. (Iowa), 117 N. W. 46	57
L. & N. R. R. Co. <i>vs.</i> Pendleton (Ky.), 104 S. W. 382	63
Louisiana Mut. Ins. Co. <i>vs.</i> Tweed, 7 Wall. 44-53	66
Mellor <i>vs.</i> Mfg. Co. (Mass.), 5 L. R. A. 792	28, 35
Manning <i>vs.</i> Polk (Ga.), 41 S. E. 1015	54
Moran <i>vs.</i> Rockland, T. & C. St. Ry. 99 Me. 127	50
McAunich <i>vs.</i> The Miss. & Mo. R. Co. 20 Iowa, 345-6	45
Nordquist <i>vs.</i> Ry. Co. 89 Minn. 485	51
Nordquist <i>vs.</i> Ry. Co. 89 Minn. 489	48
Olsen <i>vs.</i> Railroad (Minn.), 76 Minn. 149	53
O'Neill <i>vs.</i> The Keokuk & Des Moines R. Co. 45 Iowa, 547-8	47
Patterson <i>vs.</i> Lumber Co. 145 N. C. 42	46
Patterson <i>vs.</i> Lumber Co. 145 N. C. 44	41
20 Enc. of Pleading and Practice, p. 594 and notes	5
Pioneer Mining Co. <i>vs.</i> Talley (Ala.), 43 So. 800	62
Port Royal Ry. Co. <i>vs.</i> Davis, 95 Ga. 299-300	33
Reno Employers' Liability Act, p. 14	27, 37
R. R. Co. <i>vs.</i> Rush, 71 Miss. 902-3	30
Russell <i>vs.</i> Railroad (C. C. A.), 155 Fed. 22	64
R. R. Co. <i>vs.</i> Jones, 95 U. S. 439	51
Redfield on Railways, 330 <i>et seq.</i>	45
Scott <i>vs.</i> Railway Co. 90 Minn. 135	51
So. Ry. <i>vs.</i> Wade (Fla.), 35 S. E. 863	27, 35
St. L. I. M. & S. R. Co. <i>vs.</i> Taylor, 210 U. S. 281	23, 71
Stewart <i>vs.</i> Railroad, 141 N. C. 253	22
Stewart <i>vs.</i> Carpet Co. 138 N. C. 60	46
Shadoan <i>vs.</i> Railway (Ky.), 82 S. W. 567	59
Southern Railway <i>vs.</i> Guiton, 25 So. p. 34	58
Stagg <i>vs.</i> Tea Co. (Mo.) 69 S. W. 391	56
Thornton's Emp. Lia. and Safety App. Acts, Sec. 24	25
Voelker <i>vs.</i> Chicago, etc. Ry. Co. 116 Fed. Rep. 867; cited and quoted in Thornton's Emp. Lia. and Safety App. Acts, Sec. 175	4
White on Personal Injuries on Railroads, Sec. 227	41
Wood on Master and Servant, Sec. 305	36
2 Wood's Railway Law, p. 1262	45
Whitton <i>vs.</i> Railroad (Ga.), 32 S. E. 857	60
Wilson <i>vs.</i> Railway (Ky.), 113 S. W. 101	62
Wright <i>vs.</i> Rawson, 35 Am. Rep. 275	57



IN THE
Supreme Court of the United States.

OCTOBER TERM, 1911.

SEABOARD AIR LINE RAILWAY,
Plaintiff in Error, }
vs.
ERNEST DUVALL, } No. 304.
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Present Status of Case.

This case comes to this court from the Supreme Court of North Carolina upon a writ of error granted by the Chief Justice of that court. The record was filed in this court May 27, 1910. October 11, 1910, motion was made by the defendant in error to dismiss the writ or affirm the decision of the Supreme Court of North Carolina.

October 17, 1910, the court made the following order:

“ Motion postponed to hearing on merits.”

January 8, 1912, defendant in error renewed his motion to dismiss, and asked that the cause be transferred to the summary docket.

January 15, 1912, the court ordered the case transferred to the summary docket.

In previous briefs the question of jurisdiction has already been fully presented to this court.

Statement of the Case.

Defendant in error here was plaintiff in the trial court, and plaintiff in error here was defendant. For brevity we will make reference to the parties as they appeared in the trial court.

In that court plaintiff alleged that defendant operated a railroad as a common carrier and was—

" * * operating a line of railway from Portsmouth, Va., via Moncure, N. C., and other points and stations to Monroe, N. C., and other points beyond."*

"2. That on the 12th and 13th days of March, 1909, the plaintiff ** * * was in the employ of the defendant as baggage master and flagman on one of defendant's passenger trains which was being operated from Portsmouth, Va., to Monroe, N. C., and points beyond*, and on the night of the 12th of March, 1909, the said train, known and designated as train No. 33, was scheduled to leave Portsmouth, Va., at about 9 o'clock, p. m. That said passenger train left Portsmouth on said 12th day of March, 1909, at the time designated and scheduled, and proceeded on its way south towards Monroe, N. C., and plaintiff *was in and upon said passenger train in the discharge of his duty as baggage master and flagman*.

"3. That when said passenger train had reached a point on defendant's railway a short distance south of Moncure, N. C., on the morning of March 13th, ** * * the defendant negligently, carelessly and recklessly started and ran a heavily loaded and rapidly moving freight train * * * upon the same track and in the direction of said approaching passenger train upon which plaintiff was employed and engaged in the discharge of his duties*, causing the locomotives of the said passenger and said freight train to meet in a head-on collision. ** * ** That when the said trains collided as aforesaid, the plaintiff was seriously, permanently and painfully injured. ** * ** and has been damaged in the sum of seventy-five thousand dollars."

(pp. 2 and 3, Rec.)

The Federal Employers' Liability Act of 1908 in its first section provides:

"That every common carrier by railroad while engaged in commerce between any of the several States * * * shall be liable in damages to any person suffering *while he was employed by such carrier in such commerce*, * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, tracks, roadbeds, works, boats, wharfs or other equipment."

Under the well-recognized rules of pleading this complaint constituted a suit under the Federal Employers' Liability Act.

Mr. Thornton in his very excellent work on the statute under discussion, has this to say:

"It is not necessary in bringing an action under the Federal statute to specifically refer to it; in fact, it is not good pleading to do so. 'As a matter of pleading, it certainly can not be said that, in order to base a right to recovery on the provisions of the statute, it was necessary to cite the statute or its provisions in the petition.'

"A party desiring to avail himself of the provisions of a public act is only required to state facts which bring his case clearly within it."

Emerson vs. St. Louis & H. Ry. Co., 111 Mo. 161; 19 S. W. 1113.

It is not necessary in a civil action to set out a statute or refer to it in a declaration. It is sufficient if the case is brought within its provisions by alleging its requisite facts. *Inhabitants of Peru vs. Barrett*, 60 A. 968; 100 Me. 213; 70 L. R. A. 567; 109 Em. St. Rep. 494.

"It is not necessary to bring an action under the

Federal statute to specifically refer to it; in fact, it is not good pleading to do so. 'As a matter of pleading, it certainly can not be said that in order to base a right of recovery on the provisions of the statute, it was necessary to cite the statute or its provisions in the petition. The petition, in set words, charged the defendant with negligence in having and operating a car upon which was a defective, worn-out and inoperative coupler, which would not couple by impact. Charging the defendant with negligence was charging that the company had not met or fulfilled the duty imposed upon it by law, with respect to having and keeping the coupler upon the car in proper condition for use. It was not necessary, nor, indeed, permissible, under the rules of pleading, that the petition should set forth the law which had been violated, therefore when the petition charged the defendant with negligence with respect to the coupler upon the car, the defendant must have known, as the car was used in interstate traffic, the Act of Congress would necessarily come into consideration in defining the obligations resting upon the defendant company."

Voelker vs. Chicago, etc., Ry. Co. 116 Fed. Rep. 867; cited and quoted in Thornton's Employers' Liability & Safety Appliance Act, sec. 175.

"It is necessary to set out the (foreign) State statute relied on but not the Federal statute. If facts are stated that bring the cause of action within the scope of the Federal statute, as the State courts will take judicial notice of acts of Congress, but not of the statute law of other States."

Lemon, Adm'r, vs. L. & N. Railway Co. (Ky.)
125 S. W. pp. 702-3.

In so far as the question pleaded may be governed by State practice, the Supreme Court of North Carolina held a cause of action under the State Fellow-servant Act sufficiently pleaded by setting out the *acts of negligence*

charged, without making any special reference to the statute. *Hancock vs. Railroad*, 124 N. C. p. 222; 20 Enc. of Pleading and Practice, p. 594, and notes.

If, as alleged, defendant's railroad was a common carrier engaged in interstate commerce, and plaintiff when injured was in the employ of defendant as baggage master and flagman on a passenger train being operated from Portsmouth, Va., to Monroe, N. C., and was on such train in the discharge of his duties as baggage master and flagman when injured, he could only sue under the Federal statute.

The opinion of this court on the Employers' Liability Act, rendered January 15, 1912, states, relative to the scope of the Act:

"And now that Congress has acted, the laws of the States, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is." * * *

(p. 11 of the opinion.)

"When Congress in the exertion of the power conveyed to it by the Constitution, adopted that Act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the Act had emanated from its own legislature, and should be respected accordingly in the courts of the State."

(p. 13 of the opinion.)

In its answer defendant admits the allegations of Sec. 1 of the Complaint, viz., that it was a common carrier by railroad, operating a line of railway from Portsmouth, Va., via Moncure, N. C., to Monroe, N. C., and other points, etc. (p. 9, Rec.), and alleges specifically:

"Answering Article 2 of the Complaint, the defendant says that so much thereof as alleges, either

directly or indirectly, that the plaintiff was *at the time of his alleged injuries*, in the employ of the then receivers of this defendant as baggage master and flagman, and in the discharge of his duties as such upon said train, is untrue and denied." * * *
(p. 10, Rec.)

"That Art. 3 of the Complaint is denied, but in this connection the defendant admits that when said passenger train had reached a point on its railway a short distance from Moncure, N. C., * * * on the morning of March 13, 1909, a freight train, operated by the employes of said receivers, met in a head-on collision with the passenger train on said track, in the express car of which the plaintiff was riding by permission of the express messenger * * * and that the collision of said trains was due to the carelessness of some of the agents or employees of said receivers."

(p. 10, Rec.)

The answer further alleges:

"6. The defendant denies that said wreck was caused by the gross negligence, carelessness or recklessness of said receivers, but admits that it was due to the carelessness of one or more of their employees in failing to properly protect said passenger train from a collision with said freight train."

(p. 10, Rec.)

The answer further alleges that:

"If the plaintiff was injured as the result of the negligence of the then receivers of this defendant, which it denies, he caused and contributed to his own injury, in that he, in direct violation of the rules of said receivers then in force and known to him, left the baggage car of said passenger train, where it was his duty to be, and went into the express car of said train, which was in the possession and under the control of the agent of the Southern Express Company, either for the purpose of assist-

ing said express agent in the discharge of his duties or for some other purpose in no wise connected with the duties of the plaintiff's employment, and while in said express car was injured * * * but for which negligence and wrongful conduct on the plaintiff's part in leaving said baggage car in violation of the rules of his said employers, and going into the express car for the purposes aforesaid, he would not have been injured."

(pp. 10, 11, Rec.)

This answer joins issue under the Federal Act.

On the trial plaintiff admitted that his duties were set forth in rules of the receivers, of which he had a copy (p. 13, Rec.). These rules will be found on page 46 of the Record. The part here pertinent, relating to train baggagemen, is as follows:

"No. 664. They must report for duty at the appointed time, remain in baggage car while on duty except when required to take the place of the brakeman."

It is undisputed that at the time of the accident the plaintiff was in the express car, having first locked the baggage car, and gone in there (p. 14, Rec.). The plaintiff undertakes to account for being in the baggage car by stating that Mr. Rowe, the express messenger, asked him where the conductor was, and he told him, in the train collecting tickets, and Rowe said,

"'Tell him to come up in my car,' and I said 'All right, when he comes up I will.' When the conductor came to my car I told him what the messenger said; he said, 'All right, let's go see what he wants,' to me; he put his tickets up in the pigeon-hole and went on. I had to stop to lock the door. I always lock the door as I go out. I took up my lantern and started, and just as I got about

ten feet in his (the express) car, the crash threw me over completely."

(p. 14, Rec.)

The conductor, Cox, says:

"I went up in the front of the train. I did a good deal of my work, writing, etc., in the baggage car. When I got up in the front end of the train the baggage master, Mr. Duvall, says to me, 'The express messenger wants to see you in his car.' I said, 'Well, come on, go with me and see what he wants.' The express messenger was Mr. William Rowe. I got about middle way of the car, as well as I remember, or had just sat down, or was in the act of sitting down, when this terrible crash came. Mr. Duvall was coming on behind me."

(pp. 27-28, Rec.)

Now the statement of Rowe, the express messenger, was that his duties as express messenger were handling express, putting off, recording and delivering packages, and that the route agent of the Southern Express Company employed him and he had charge of the car he was in while en route; that there was no baggage in the express car the night of this wreck; that Duvall, plaintiff, came into the car the night of the wreck. He first came in between Weldon and Portsmouth; soon after leaving Raleigh he came in again, three or four minutes afterwards, and was there when the wreck occurred.

"He was assisting me in checking the freight express packages, the reason he came in was, we had a conversation when the train was standing at Johnson Street station, Raleigh, and I said 'I have a heavy run and am not yet through work,' and asked him to come in and help me soon after leaving the station at Raleigh, and he agreed to do so, and did come in. It was not long before the wreck that Mr. Cox (the conductor) came into my car about

ten minutes, I would say. He remained there until the wreck occurred. I did not send for him that night; did not tell Mr. Duvall to tell him to come in. After Mr. Cox and Mr. Duvall came in Mr. Duvall was helping me for a short while, four or five minutes, when Mr. Cox came in, and we three took a drink of whiskey. At the exact time of the wreck I was recording way bills, I think Mr. Duvall was sitting, or may be standing on the left side of the car. He was not checking for me then; don't know whether I was through checking or not, but I was through work for that time. I was recording freight. Had a pretty good run of freight that night. We always have a pretty good run on Friday night, leaving Portsmouth, fish and oysters and a lot of packages of whiskey."

(pp. 33-34, Rec.)

Defendant asked numerous instructions applicable to evidence that favored the defendant's contention that the plaintiff was, at the time of the injury, not employed in interstate commerce by the common carrier by railroad that was being sued. Objection likewise was made to instructions given which ignored this phase of the evidence.

Discussion further on will show that the instructions raised the question of a proper construction of the Federal statute.

Section 3 of the Employers' Liability Act is as follows:

"That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee * * * the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

At common law and under the statute of North Carolina the contributory negligence of the plaintiff would excuse the defendant. The doctrine of comparative damages proportioned to the amount of negligence attributable to the employee has no place except under the Federal statute in question.

In almost the identical language of the statute the trial judge gave the following charge:

"If you answer the second issue yes," (the second issue was whether the plaintiff was guilty of contributory negligence) "then on the question of damages, the court charges you that, in an action like the one being tried, if the jury shall find from the evidence that the plaintiff, an employee of the defendant company, was guilty of contributory negligence; that is, that he contributed to his own injury, such negligence would not bar a recovery, if the defendant was guilty of negligence also, but the damages which the jury shall, under the evidence, assess to the plaintiff shall be diminished in proportion to the amount of negligence attributable to the plaintiff."

(p. 81, Rec.)

This shows that the case was tried under the statute. When the trial judge settled what the Record should be that would go to the Supreme Court on appeal he used the following language; under the heading

"CASE ON APPEAL."

"This was a civil action instituted by plaintiff and tried under the Employers' Liability Act, passed by the Congress of the United States on the 22d day of April, 1908, to recover damages for personal injuries sustained by him on the 13th day of March, 1909, as the result of a collision of the passenger train upon which he alleges he was acting as baggage master, and a freight train, near Sanford, N. C."

(p. 13, Rec.)

The entire record was before the Supreme Court of North Carolina, and in its opinion the court said:

"The defendant contends that under the Federal Employers' Liability Act the plaintiff is not entitled to recover for three reasons.

"1st. That at the time of the injury that plaintiff was not an employee of the defendant.

"2d. That he was not injured while in interstate commerce.

"3d. That he was not injured as a result of defendant's negligence."

In plaintiff's brief before the Supreme Court of North Carolina, copy of which is filed here, it is stated (p. 4):

"This cause was tried under the Federal Employers' Liability Act passed by the Congress of the United States of April 22, 1908."

Again, in a supplementary brief filed in the Supreme Court of North Carolina, the plaintiff also states:

"The defendant's theory of the case is that plaintiff is not entitled to recovery under the Federal Employers' Liability Act for three reasons:

"1st. That at the time of the injury plaintiff was not an employee of the defendant.

"2d. That he was not injured while engaged in interstate commerce.

"3d. That he was not injured as a result of defendant's negligence."

The plaintiff contends that

"Under all the evidence in this case when he was injured he was employed in interstate business; that he was in the place where he was required to be, under the rules of the receivers; that he had violated no rule of the receivers, and that when he was injured he was in the line of his duty and was acting within the scope of his employment."

The italics used in the above quotation are as found in plaintiff's brief.

The defendant's brief in the Supreme Court of North Carolina, copy of which is herewith filed, commencing on page 5 and extending to page 32, discusses the case at length under the general heading—

"PLAINTIFF NOT ENTITLED TO RECOVER UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT UPON DEFENDANT'S THEORY OF THE CASE."

And the same argument runs through the discussion *seriatim* of the errors in instructions given or refused by the court.

The plaintiff now contends he never sued under this act; that no question was raised under it, and the highest court of North Carolina never passed on it.

Specification of the Errors Relied On.

The defendant assigns the following errors committed by the Supreme Court of North Carolina upon the trial of this case:

1. That the court erred in overruling the defendant's objection to, and in permitting the plaintiff to be asked and answer, the question as set forth in the defendant's first exception, as follows:

Q. What were your duties, Ernest, as flagman and baggage master?

By DEFENDANT'S COUNSEL:

Q. Were your duties set forth in the rules of the receivers of the defendant?

A. Yes.

Q. Did you have copy of these rules in your possession at time of injury?

A. Yes.

(The defendant's counsel then offered to furnish the witness a copy of said rules, which offer was declined.)

The defendant objects to the witness giving oral testimony as to his duties, when it appears that the same are set forth in the rules of the receivers of the defendant, which rules are in court and subject to his use. Overruled. Defendant excepts.

A. To handle all baggage that was entrusted to my car; all the company's mail; to look after the comfort of the passengers on the train and prevent any one from riding free. I was under the conductor's orders and have to obey his orders, as he will so state, and to look after the United States mail, all that was put in my car. We were compelled to carry it to the postal car and deliver it to them.

2. That the court erred in overruling the defendant's objection to, and in permitting the plaintiff to be asked and answer the question as set forth in the defendant's second exception, as follows:

Q. State whether or not this baggage that you speak of being often carried to the express car was known to the officers of the railroad, to your own knowledge.

By HIS HONOR: Do you know that, of your own knowledge?

A. Yes, I know it.

(Defendant objects to evidence as to what was done at any other time, and asks that the evidence be confined to what was done on the night of the injury. Objection overruled. Defendant excepts.)

A. Yes, sir; they knew it.

3. That the court erred in overruling the objection to, and permitting the witness Gwathney to be asked, and answer, the question as set forth in the defendant's third exception, as follows:

Q. What are the probable results in regard to injuries to the spinal cord?

(Defendant objects; overruled; exception.)

By HIS HONOR: Can you undertake to say that there is any definite or certain result from injury to the spinal cord?

A. Yes, sir.

(Objection; overruled; defendant excepts.)

A. Paralysis, partial or complete.

4. That the court erred in overruling the objection to, and permitting the witness Gwathney to be asked, and answer, the question as set forth in the defendant's fourth exception, as follows:

Q. Can you state at what time, in your opinion, operations should be performed for the relief of injuries to the spinal cord?

(Defendant objects; overruled; exception.)

A. Your Honor, the question is rather a broad one, and I will have to answer it somewhat in detail. Injuries which may cause or have caused a complete severance of the cord, in which there is a complete severance of the cord, it is useless to operate at all. Where there are pressure symptoms, and we suspect partial injury to the cord, early operation should be undertaken, before the pressure has caused a change or degeneration and for formation of scar (?) tissue in the fibers which prevent their performing their functions. We can say that where operation is undertaken at all, it should be undertaken with considerable promptitude—that is, in as short a time as the condition of the patient will permit—as soon as the first shock of the injury, and the depression which follows it, are past.

5. That the court erred in not granting the defendant's motion to strike out the answer of witness Gwathney as not being responsive to the question propounded to him by the plaintiff's counsel, as set forth in the defendant's fifth exception, as follows:

Q. State, from your examination made of this man, what, in your opinion, is the cause of his trouble.

A. I think I can do that entirely candidly and with an open mind, and still give an opinion as though I had never seen the X-ray photograph.

This man had an injury to his backbone, the spinal, bony column, which caused pressure and a severance of certain fibers in his cord, producing the condition of partial paralysis in his legs and a loss of sensation from the juncture of his middle and upper third of his thigh downward, including the feet. He is incapable of walking or using his lower limbs except in a very spastic fashion—jerky—and is unable to stand unsupported.

6. That the court erred in overruling the objection to, and permitting the witness Gwathney to be asked and answer the question as set forth in the defendant's sixth exception, as follows:

Q. I wish you would state, from your examination in this case, your knowledge of it, acquired from your examination of the patient, whether or not you consider this case one of permanent injury, either with or without an operation.

(Defendant objects; overruled; defendant excepts.)

A. I do consider his injuries permanent, with or without an operation.

7. That the court erred in not granting the defendant's motion to strike out the answer of witness Gwathney as not being responsive to the question propounded to him by the plaintiff's counsel, as set forth in the defendant's seventh exception, as follows:

Q. State, doctor, what effect, if you know, from your examination of this patient, this injury has had upon his nerves.

A. Well, the boy has suffered very greatly, and suffering, of course, will make any individual depressed and upset and abnormal, from a general nervous point of view.

8. That the court erred in overruling the objection to, and permitting the witness Gwathney to be

asked and answer, the question as set forth in the defendant's eighth exception, as follows:

Q. I believe Mr. Cansler asked you if you advised the physician that an operation was the best thing?
(Defendant objects; overruled.)

Q. What did you state in reference to an operation?

(Defendant's objection sustained. Plaintiff excepts.)

Q. What did you advise the attending physician?
(Defendant objects.)

By HIS HONOR: If it was at the same time he was called in consultation, the witness may state what he advised the physicians.

(Defendant excepts.)

A. I advised an operation, with the hopes of relieving part of his condition, particularly his suffering, or part of it, stating that I did not hope for or expect a relief of the complete condition.

9. The court erred in overruling the defendant's objection to and in permitting the witness Nail to be asked and answer, upon cross-examination, the question set forth in the defendant's ninth exception, as follows:

Q. In speaking of the comparison of the danger there, one car with the other, I ask you if, in your opinion, it was not highly probable that a man in that baggage car would have been either killed or seriously injured?

(Defendant objects; overruled; and defendant excepts.)

A. Well, my opinion is that I wouldn't like to have taken chances.

10. That the court erred in refusing to grant the defendant's motion to strike out so much of the testimony of the plaintiff as appeared between the letters (a) and (b), as set forth in the defendant's tenth exception, as follows:

(a) He said they were a short distance south of Raleigh and he thought he heard something or somebody get up in his car on the front of the train, and he didn't know what it was; then we went to the baggage car and asked Ernest Duvall. (b)

11. That the court erred in refusing to grant the defendant's motion to strike out so much of the testimony of the plaintiff as appeared between the letters (c) and (d), as set forth in the defendant's eleventh exception, as follows:

(c) I asked him if they drank any whiskey in that car or at any time while on duty, and he said that he had not, and neither of the other men had. He said if the railroad claimed any such defense as that there was not a word of truth in it. (d)

12. That the court erred in refusing to grant the defendant's motion to withdraw a juror and make a mistrial for the misconduct of the plaintiff's witness, Cox, as set forth in the defendant's twelfth exception, as follows:

Q. Then why did you go up there to try to prove that there was not any whiskey drunk?

A. Because I had been hearing for six months that you all (pointing to the counsel who was cross-examining him) were going to try to prove a whole lot of lies about our stealing and drinking whiskey there, and I wanted to prove that they were lies.

(At this point the counsel made towards the witness, and the witness rose up and was in the act of striking counsel with his stick, when another counsel came between the parties and prevented his doing so.)

The defendant thereupon objected to the witness's answer and his demonstration in open court as being highly prejudicial to the rights of the defendant before the jury, and moved that a juror be withdrawn and a mistrial be ordered. The court took

the matter under advisement and stated that he would pass upon the motion the next morning.

The defendant here renews its motion, made on the previous afternoon, to withdraw a juror because of the misconduct of the witness Cox while upon the stand in charging the defendant and its counsel had been concocting lies to prejudice the witness and the plaintiff, and because of what transpired as the result of said charge. The motion was overruled, and the defendant excepted.

13. That the court erred in overruling the defendant's objection to and in permitting the plaintiff to be asked and answer the question as set forth in the defendant's thirteenth exception, as follows:

Q. Mr. Duvall, Mr. Rowe testified yesterday in your absence, as I have it, that in a conversation between him and you and Mr. Cox that Cox said at Sanford, in the hospital, that Rowe had sent for him because he thought some one was in front end of the car, and suggested to Mr. Rowe that that would be a good proposition for you all to adopt for the reason of your being in the front end. State whether or not a conversation of that kind was had between you?

(Defendant objects; overruled; defendant excepts.)

A. No, sir; there was not.

14. That the court erred in overruling the defendant's objection to and in permitting the plaintiff to be asked and answer the question as set forth in the defendant's fourteenth exception, as follows:

Q. Mr. Rowe said that in that same conversation some one or all of you said it was unfortunate that you had taken a drink in the express car. Was anything of that kind said?

(Defendant objects; overruled; and defendant excepts.)

A. No, sir; there was not.

15. That the court erred in overruling the defendant's objection to and in permitting the plaintiff to be asked and answer the question as set forth in the defendant's fifteenth exception, as follows:

Q. Mr. Rowe states in his testimony, in your absence, that you came into the car shortly after you left Raleigh and was helping him in the express car there, and that you had been in there for some time before the wreck, and that he had invited you in the car at Johnston Street Station, Raleigh. Is that true?

(Defendant objects; overruled; and defendant excepts.)

A. No, sir, that is not exactly the way it happened.

16. That the court erred in refusing to give the defendant's first prayer for instruction, as set forth in its sixteenth exception.

17. That the court erred in refusing to give the defendant's second prayer for instructions, as set forth in its seventeenth exception.

18. That the court erred in refusing to give the defendant's third prayer for instruction, as set forth in its eighteenth exception.

19. That the court erred in refusing to give the defendant's fourth prayer for instruction, as set forth in its nineteenth exception.

20. That the court erred in refusing to give the defendant's fifth prayer for instruction, as set forth in its twentieth exception.

21. That the court erred in refusing to give the defendant's sixth prayer for instruction, as set forth in its twenty-first exception.

22. That the court erred in refusing to give the defendant's seventh prayer for instruction, as set forth in its twenty-second exception.

23. That the court erred in refusing to give the defendant's eighth prayer for instruction, as set forth in its twenty-third exception.

24. That the court erred in refusing to give the defendant's ninth prayer for instruction, as set forth in its twenty-fourth exception.

25. That the court erred in charging the jury as appears between the letters (a) and (b), as set forth in the defendant's twenty-fifth exception, as follows:

(a) If you find from the evidence, and the greater weight thereof, the burden being on the plaintiff, that the plaintiff's injury was caused by the defendant's negligence, proximately caused, you should answer the first issue "Yes." If you do not so find you should answer it "No." (b)

26. That the court erred in charging the jury as appears between the letters (c) and (d), as set forth in the defendant's twenty-sixth exception, as follows:

(c) If you find from the evidence that the plaintiff had no right to go into the express car, that he was not where he should have been, and you further find that he would not have been injured but for his going into the express car, and that his going into the express car was such an act on his part that a reasonably prudent man ordinarily would not have done under the circumstances of the situation, then he would be guilty of contributory negligence, and it would be your duty to answer the second issue "Yes." If you do not so find it would be your duty to answer the second issue "No." (d)

27. That the court erred in its entire charge to the jury, because it was too general, in that the court did not declare and explain the law arising upon the defendant's theory of the case supported

by its evidence, as bearing upon the first issue, as set forth in the defendant's twenty-seventh exception.

28. That the court erred in refusing to set the verdict aside on the third issue, because the same was manifestly excessive and because the jury could not have been governed and controlled by the testimony in the case as bearing upon said issue, as set forth in the defendant's twenty-eighth exception.

29. That the court erred in overruling the defendant's motion for a new trial for errors set out in the case on appeal, as set forth in the defendant's twenty-ninth exception.

30. That the court erred in granting the judgment for the plaintiff as appears in the Record, as set forth in the defendant's thirtieth exception.

(pp. 84-89, Rec.)

ARGUMENT.

Errors in the Admission and Rejection of Testimony.

These are covered by Assignments 1 to 11, inclusive, 13 to 15, inclusive.

In each instance the evidence objected to is set out in full and the exceptions speak for themselves; and we believe this court will see that they were well taken, and the contentions of defendant should have been sustained. We will only say, as to the first exception: After the plaintiff had admitted that his duties were set forth in printed rules and he had with him a copy of the same, and defendant had offered to furnish the witness with a copy, the witness should not have been allowed to give oral testimony as to what his duties were. The answer

of the witness does not set forth correctly his duties as contained in the rules. He did not state that his duties required him to remain in the baggage car except when discharging the duties of the brakeman, and the jury was thus allowed to consider evidence which ignored this very important factor in what constituted the liability of defendant. The construction of these rules was for the court, and not for the jury.

"We find nothing in the rules requiring or justifying resort to expert evidence in regard to the meaning of the language used. While there are a large number of rules, and to one not familiar with the operation of trains not so clear as might be desired, we see no reason why they may not be interpreted by giving the language used its ordinary meaning and significance. * * *

Treating the rules as a part of the contract of service made by the defendant with plaintiff's intestate, it is plain that, being in writing, or, what is the same thing, print, their construction is for the court."

Stewart vs. Railroad, 141 N. C. 253.

The admission of this oral evidence cast upon the defendant the burden of proving the fact, which it was primarily the duty of the plaintiff to prove in making out his case.

The court did not even expressly instruct the jury that the plaintiff was bound by the rules of the company, and that in passing upon the question as to plaintiff's duties the jury must find that they were correctly set forth in the rules introduced by the defendant, and not in the testimony as given by the plaintiff.

Assignment 12.

This was a motion to withdraw a juror and make a mistrial for the misconduct of the plaintiff's witness Cox.

The conduct of this witness is fully set forth, and we think entitled the defendant to the allowance of the motion.

Errors in the Instructions of the Court.

Before treating these instructions separately, we will discuss the law that should govern the case, should the jury believe that the rules of the defendant governing the plaintiff's employment were correct and also either the undisputed fact that at the time of the plaintiff's injury plaintiff had locked up his baggage car and gone forward into the express car for reasons stated by him and the conductor; or should believe the testimony of Mr. Rowe, the express messenger, that plaintiff was in that car for the purpose of assisting him (Rowe), an employee not of the railroad but of the express company, in checking up express packages, and was actually engaged in rendering that assistance until just a moment or so before the accident happened. The defendant was entitled to a proper construction of the law applicable to all the above evidence.

There was presented the questions of whether plaintiff was injured while employed by the defendant in interstate commerce; whether at the time of the injuries he was an employee of the defendant at all; also, if, when injured, he was employed by defendant in interstate commerce, whether the defendant's negligence was the proximate cause of his injury. There was evidence before the jury upon all these questions. That evidence constituted the defendant's defense, and he was entitled to instructions construing the statute which, upon a finding of facts from the evidence, might lead to a judgment in his favor. This court has enunciated the following principle, in *St. L., I. M. and S. R. Co. vs. Taylor*, 210 U. S. 281:

"Where a party to litigation, in a State court, insists by way of objection to, or requests for instructions, upon a construction of a statute of the

United States which will lead to, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect being duly set up, is denied by the highest court in the State, then the question thus raised may be reviewed in this court. The plain reason is that, in all such cases he has claimed in the State court a right or immunity under a law of the United States, and it has been denied him. Jurisdiction so clearly warranted by the Constitution and so explicitly conferred by the act of Congress, needs no justification. *But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured as that they shall have the same meaning and effect in all the States of the Union.*" (Italics ours.)

At p. 293.

In the same case it is also said:

"The evidence, therefore, in its aspect most favorable to the plaintiff, tended to show that the fully loaded car was equipped with an automatic coupler which, at the time, was four inches lower than the link and pin coupler of the lightly loaded car. On the other hand, the evidence, in its aspect most favorable to the defendant, tended to show that the automatic draw-bar of the loaded car was exactly one inch lower than the link and pin draw-bar. It was the duty of the jury to pass upon this conflicting evidence, and it was the duty of the presiding judge to instruct the jury clearly as to the duty imposed upon the defendant by the act of Congress."

At p. 288.

It is our contention that under the evidence above referred to, if that evidence was believed, the plaintiff could not have recovered, because—

- (1) He was not injured *while employed* in interstate commerce.

(2) At the time of the injury he was not an *employee* of the defendant.

(3) He was not injured as the result of the defendant's negligence.

I. The Plaintiff, not being Employed by the Defendant in Interstate Commerce at the Time of his Injury, can not Recover Under the Federal Employers' Liability Act.

Assuming, for argument's sake, that the plaintiff, in leaving the baggage car and going into the express car, in violation of rules, to assist the express messenger, did not suspend the relation of master and servant between himself and defendant, still, when he was in the express car discharging none of the duties of his employment, was he injured "*while employed by the defendant*" *in interstate commerce?* Upon the evidence offered by the defendant the question squarely arises as to the meaning of the words "*while he is employed by such carrier in such commerce,*" as used in the second section of the Act.

Thornton, in his work on Employers' Liability and Safety Appliances Acts, discussing this language, says (Sec. 24) :

"If he be an employee of the railroad company and, at the time of his injury, be not engaged in interstate commerce, he can not recover under the provisions of the statute. * * * As the employee must be engaged in the interstate commerce of his employer, from the very nature of the question, his employer, at the moment of the injury, must be engaged in interstate commerce, not generally, but in that specific instance, and in that identical commerce he must be injured if he recovers under the statute."

He also says in the same section :

"It is an interesting question concerning what employee may bring his action upon the statute or claim a right to recover damages thereupon for his injuries. It is tautology to say that he must have been an employee of the defendant at the time of the injury, and be injured in the line of his duty. This is elementary and need not be discussed. In fact, it is here assumed. The statute, in part, answers the question when it provides that 'every common carrier by railroad, while engaged in commerce between any of the several States,' 'shall be liable in damages to any person suffering injury *while* he is employed by such carrier in such commerce.'

"This last-quoted clause designates the employee who can recover for his injuries; for he must be injured 'while he is employed by such carrier in' commerce between the States or between the States and Territories. * * * The word 'while' is significant, for by its terms the employee must be engaged in interstate commerce, in order to enable him to recover under the statute."

If there can be recovery where an employee of a common carrier by railroad was not employed by such carrier in interstate commerce, why should this court have declared the Employers' Liability Act of 1906 invalid, upon the ground that the act undertook to protect railway employees, *not at the time of their injury actually engaged in interstate commerce.*"

Upon that question the reasons given by the court, speaking through the present Chief Justice, in *Howard vs. Ill. Cent. R. R. Co.* 207 U. S. 463, are pertinent:

"Thus the liability of a common carrier is declared to be in favor of 'any of its employes.' As the word 'any' is unqualified, it follows that liability to the servant is co-extensive with the business done by the employer whom the statute embraces; that is, it is in favor of any employee of all carriers who engage in interstate commerce * * * the act then being

addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of their employees, without qualification or restriction as to the business in which the carriers, or their employees may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce."

Counsel, in support of the constitutionality of that act, argued for a construction which would confine its application to those employees only who were actually engaged in interstate commerce at the time of their injury, and in answering that argument the court said:

"So far as the face of the statute is concerned, the argument is this: that because the statute says carriers engaged in commerce between the States, etc., therefore the act should be interpreted as being exclusively applicable to the interstate commerce business, and none other, of such carriers, and that the words 'any employee,' as found in the statute, should be held to mean any employee, when such employee is engaged only in interstate commerce."

What was there conceded by counsel to save the life of the act, the legislation that subsequently followed and the construction put by this court on the act of 1908, all establish beyond question that the act is limited to employees who suffer injury from a common carrier by railroad while engaged in interstate commerce only while such employee "*was employed by such carrier in such commerce.*"

In support of this view, see also

- 2 Labatt, Master and Servant, Secs. 719-720.
- Reno Employers' Liability Act, 14.

Analogous questions that have arisen in State courts in construing local employers' liability acts have been decided as herein contended for.

So. Ry. Co. vs. Wade (Fla.), 25 So. Rep. 863.

Mellor vs. Mfg. Co. (Mass.), 5 La. R. A. 792.
Bean vs. R. R. 98 Ala. 586.

1 Dresser Employers' Liability Acts, Sec. 13.

It is undisputed that at the time of the accident the plaintiff had locked up the baggage car, where the printed rules, of which he admits he had a copy and which were a part of his contract, required him to be when not acting as brakeman, and was in the express car.

To justify his being there and not dissociated from his employment, it is contended that he was there by order of the conductor.

Admitting for argument's sake that there are instances where, as between a conductor and a baggage master the fellow servant's rule does not apply, and the conductor can give to the baggage master orders which it is his duty to obey, still, the conductor would have to give a distinct explicit order, and further it would have to be to do something that was the employer's business.

An order of the conductor to an employee to do a thing the employee was prohibited from doing by a written rule of the railroad, with which he was familiar, would not excuse the employee from such risk as he might take in disobeying the written order of the employer.

An examination of the evidence shows that in this instance there was really no order given the baggageman.

The plaintiff, after having testified to Mr. Rowe's having asked him to tell the conductor to come up in his car, states:

"When the conductor came to my car I told him what the messenger said. He said, 'All right, let's go see what he wants.' "

The conductor says:

"When I got up in the front end of the train the baggage master, Mr. Duvall, says to me, 'The ex-

press messenger wants to see you in his car.' I said,
'Well, come on, go with me and see what he
wants.'"

(pp. 27, 28, Rec.)

We think the most that could be claimed from this testimony would be that the plaintiff went into the express car with the assent of the conductor. What the conductor said certainly was not an order. It smacks of an invitation.

It would be natural that the plaintiff should want acquiescence by the conductor in his violation of known rules. Rowe testified that the first thing done when the conductor and baggage master came into the car was for the three to take a drink.

As to any custom justifying his right to go into the car, the testimony on that subject is from the witness Wren, who states:

"Yes, I know what the custom has been on that road prior to the 13th day of March, 1909, with reference to the baggage master going into the express car. The custom has been that when there is baggage in the express car he has a right to go in there, check up and look after it the same as if he were in the baggage car. When there was no baggage in the express car he had no right in there. They evidently went in there sometimes. The custom was not to go."

(p. 45, Rec.)

The express messenger, Rowe, states, and this testimony is not contradicted:

"There was no baggage in the express car the night of this wreck."

(p. 34, Rec.)

Bronson, route agent for the Southern Express Company, testifies:

"It is against the rules to allow anybody outside of the officials of the express company, in the express car unless he has a letter from the route agent or superintendent authorizing him to carry them.

* * * The railroad company was entitled to carry baggage in the express car in case of overflow. When there was a baggage car the baggage is carried there according to instructions. When there was no baggage car on the train the baggage was just carried in the express car. I have never observed the rules of the company being violated in this particular on this route."

(p. 47, Rec.)

Where it is shown that it has been the custom for an employee of a railroad to violate a rule he does so at his own risk, unless the custom is both well-established and its abrogation proved to be known to the master. The law bearing upon acts of an employee on a train done with the assent of the conductor is set out in the following cases:

"The real question in this case is as to the validity and obligation of the rule of the company requiring coupling and uncoupling of cars to be done by means of sticks and forbidding the going between cars when an engine is attached. If this rule was in force and obligatory on Rush he certainly is not entitled to recover for an injury sustained in its violation. He knew the rule and had contracted with reference to it, and if he violated it and sustained injury in consequence of it, he can not be heard to complain of his employer. He can not shelter himself under the order of the conductor, for even if it is conceded that the conductor in directing the uncoupling, was 'a person having the right to control or direct the services of the party injured' within the meaning of Sec. 193 of the constitution of 1890, it can not be held that he was under any obligation to obey an order of such person to violate the rule equally obligatory on the conductor and himself.

Therefore the question whose resolution will decide this case, is as to the rule mentioned. It seems to be a very proper rule, and if it was in force and disregarded without excuse by the unfortunate brakeman he must bear the misfortune of his own indiscretion.

"It is apparent that the trial court had a correct view of the decisive question in the case, and yet gave two instructions, drawn by the learned counsel for the plaintiff, by which the plaintiff may have obtained the verdict he got without any regard to the rule in question. The first instruction for the plaintiff omits all reference to the rule and entitles the plaintiff to recover if he acted upon the conductor's orders and suffered hurt from the negligence of the conductor in too soon giving the signal to the engineer to move. The fifth instruction makes the conductor's knowledge of the uncoupling without a stick and too hastily causing the movement of the train, ground for recovery. Under these instructions the jury could hardly fail to find for the plaintiff although directly instructed otherwise perhaps. Both are wrong and should have been refused. Be the relation of the conductor to the brakemen what it may, he surely had no authority to dispense with an existing rule made for him and for them, and neither his orders nor his acquiescence, as to its violation, could give any right or have any just influence in the case."

R. R. Co. vs. Rush, 71 Miss. 902-3.

"The proposition here plainly stated is that if plaintiff disobeyed the rules of the company and such disobedience contributed directly to the injury, he may nevertheless recover, and can not be held guilty of contributory negligence, providing that such disobedience was with the knowledge and consent of the conductor of the train. Or, in other words, if the conductor fails to enforce the rules of the company, the employee may knowingly disregard them, and yet in no manner be barred from

recovering for injury which would not have resulted but for such disobedience. With that doctrine we can not concur. It is not pretended that the conductor directed the plaintiff to remain on the platform and not go on top of the caboose. A different question may arise in case the violation of the rules of the company is in obedience to a direct command from the immediate superintendent, but a decision of that question is unnecessary in this case. The duty of obedience to the rules of the employer is one resting alike upon all employees; and when an employee claims to recover from his employer for injuries resulting through the latter's negligence, he can not escape the consequences of his own act contributing to such injury—an act done in known violation of the rules of such employer—on the ground that his immediate superintendent knew and assented to such act of violation. If it were otherwise, then the supineness and negligence of any superintending officer of a corporation would relieve a subordinate from responsibility for his conduct. In other words, the wrong of one employee is excused by a like wrong of another. The employee injured through his own omission of duty escapes liability for such omission because some other employee is equally careless. The question has not infrequently arisen whether knowledge and assent on the part of the conductor, or other official of a train, of a violation of one of the rules of the company by a passenger relieves the latter from the burden of contributory negligence arising from such violation, and the response has almost uniformly been in the negative. It is true that in those cases the party injured was not an employee, subject to the control of the officer whose knowledge and assent to the violation was relied upon as an excuse, but the principle underlying is the same. The question is not one of obedience to orders, but of compliance with rules; and generally speaking the duty of compliance is not waived by the mere fact that some controlling official has knowledge of the failure to com-

ply. In the case of *R. R. Co. vs. Jones*, 95 U. S. 439, the party injured, who, though an employee, was not employed on the train or subject to the control of the conductor, was riding on the pilot of the locomotive, contrary to the directions of his employer, but with the knowledge and assent of the persons in charge of the train; and it was held that his thus riding was contributory negligence and not excused, the court observing, 'The knowledge, assent, or direction of the company's agents as to what he did is immaterial.'"

Atchison, T. & S. F. R. Co. vs. Rusman, 60 Fed. Rpt. 377-8.

"4. Exception is taken to the following charge of the court: 'If you believe the plaintiff was instructed by the conductor to couple the cars without a knife or stick, and that when he was about to enter upon the discharge of this duty, the conductor was in position to see that he had no knife nor stick in his hand to perform the coupling with, and he allowed him to proceed without it, and the plaintiff was then and there injured, then I charge you that the plaintiff was not negligent in not having such knife or stick, and he is entitled to recover if he is injured without fault on his part and by the carelessness of the agents of the company.' A rule of the company had been introduced in evidence which required the use of a knife or stick in making couplings. The charge in the first place assumed that there was evidence submitted to the jury which might tend to show that the conductor instructed the plaintiff to couple the cars without a knife or a stick; whereas, while it may be found under the evidence that the conductor instructed the plaintiff, he not having a knife or stick, to couple the cars, there is no evidence from which the jury could find an affirmative instruction from the conductor to the plaintiff to couple the cars without using a knife or stick. This charge, for this reason, was erroneous. The second error in the charge is that if the con-

ductor saw the plaintiff about to make the coupling without the use of a knife or stick and neglected to compel him to desist, without giving him affirmative instructions at all upon the subject, the conductor's negligence would so neutralize the effect of any negligence of the plaintiff upon his own part as wholly to acquit him of negligence. It would be a strange rule of law which would justify the negligence of an employee in the performance of his duties, by simply showing that another employee engaged about the same business was likewise negligent. The apparent duty of guardianship by the superior officer over the conduct of his coemployee and making him responsible for the injuries of the coemployee without reference to the negligence of the latter, which is set up and established by the instruction of the court, has no warrant in the law. A positive instruction by one in authority to his inferior to perform a particular service in a particular way, is one thing; and the omission to give an instruction when none was necessary, is entirely a different thing. For the court to say that the alleged negligence of this conductor would acquit this plaintiff of negligence, was to withdraw from the consideration of the jury altogether the question as to whether or not the plaintiff was not himself negligent in obeying such instructions, assuming even that they were given."

Port Royal Ry. Co. vs. Davis, 95 Ga. 299-300.

On testimony for the plaintiff, viz., that given by himself and the conductor, accounting for his being in the express car, he was at the time of the accident not employed by the defendant in interstate commerce. There was, though, also the testimony of the witness Rowe, already referred to, that he had requested plaintiff to come into the car to help him check up his work, which work was not for the defendant, but for the express company, and that the plaintiff came, helped him in this

work, and was actually assisting him almost up to the moment the collision occurred.

Upon the question of an employee going to a place different from that which the contract of services requires him to occupy, Elliott has this to say:

"Some of the cases hold that where an employee uses an appliance for a purpose for which it is not intended, or goes to a place different from that which the contract of service requires him to occupy, he is guilty of contributory negligence, and for that reason, can not hold the employer liable, but we are of the opinion, as elsewhere indicated, that in such case the true ground upon which the rule that the employer is not liable rests is that the duty of the employer does not extend over such cases. We think there may be no negligence on the part of the employee, and still a recovery can not be had because he goes to a place, or does an act, not embraced by the contract of service and while there, is not within the duty created by the contract."

3 Elliott on R. R. (2d edition), Sec. 1313, pp. 763-764.

That one is not an employee under such circumstances has been held in construing other employers' liability acts.

In a case under the Florida statute, where the plaintiff, one of a bridge gang employed by defendant, was injured in a collision with a locomotive while riding on his car from his work, by permission of the foreman, it was held he could not recover, the court saying:

"One so injured, therefore, is not an employee within the meaning of the present statute."

Southern Ry. Co. vs. Wade, (Fla.) 35 S. E. 863.

In *Mellor vs. Mfg. Co.* (Mass.), 5 L. R. A. 792, a suit under the Massachusetts Employers' Liability Act of 1887, *Mr. Justice Holmes* said:

"By his own story the plaintiff was intending to make repairs which it was no part of his duty to make, and started to do so of his own free will, upon the suggestion of a fellow-workman, Ogara, after asking and obtaining the mere consent of his own immediate superior. He was only a volunteer, and could stand no better than a stranger would have done who should have offered and should have been permitted to make the same repairs."

And again, referring to an English case, the learned Justice further says:

"Even the Master of the Rolls, who dissented in *Thomas vs. Quartermaine*, says that he never entertained a doubt that the Employers' Liability Act does not prevent the proper application of the maxim, *volenti non fit injuria*."

Under the Alabama Act, where the plaintiff was the joint employee of two companies, it was held he could not recover against one company for injuries received while shifting cars for the other company, though on defendant's track, the court saying, quoting from Wood on Master and Servant, Sec. 305:

"The relation of master and servant only exists where the persons sought to be charged as master either employed or controlled the servant, or had the right of control over him at the time when the injury happened, or expressly or tacitly assented to the rendition of the particular service by him.
 * * * (After quoting the evidence.) It thus unmistakably appears from the undisputed evidence that the service plaintiff was engaged in when hurt was exclusively that of the Louisville and Nashville Railroad Company, in which the other defendant had no interest, and, in respect of which, no right of control over the plaintiff. The averment of the complaint, in legal effect, is that in respect of this service the plaintiff was in the joint employment of

both defendants. There is therefore a fatal variance between the allegation and the proof, and the general charge for the defendant was properly given."

Dean vs. Railroad, 99 Ala. 586.

See also Reno Employers' Liability Acts, p. 14.

The rule as laid down in the above cases is a natural one. It does not require an employee to show that at the very time of his injury he was *actively* engaged in discharging some labor pertaining to interstate commerce. It recognizes fully that "he also serves who only stands and waits." A person though to be an employee engaged in interstate commerce must be at his post of duty ready to answer his master's call, so it can be said he was injured in the line of his duty. To hold otherwise would broaden the scope of the act to include other than employees *engaged in interstate commerce when injured*, and render the present act as objectionable and as unconstitutional as was the act of 1906.

Here we invite attention to assignments of error 16 to 22 (p. 88, Rec.) relating to instructions 1-7, being exceptions 16 to 22, pages 75 to 77, Record.

Some of the instructions covered by these exceptions should have been allowed for other reasons than for the one herein assigned, viz., that the plaintiff was not actually engaged by the defendant in interstate commerce at the time of his injury.

As applicable, however, to the subject now under discussion, we would say that these instructions all relate to the correct rule of law to be applied where a plaintiff employed is injured when he has left the place where his contract of service requires him to be, and has gone to another place, either for purposes of his own or to engage in a service connected with an employment independent of and different from that covered by his contract with the defendant employer.

The above referred to instructions the court not only refused to give, but charged the jury as follows:

"If you find from the evidence and the greater weight thereof, the burden being on the plaintiff, that the plaintiff's injury was caused by the defendant's negligence, proximately caused, you should answer the first issue 'yes.'"

(Top p. 80, Rec.)

Refusing to give the instructions asked and giving the instructions above quoted, meant a denial to the defendant of the right of instruction to the jury upon the evidence it relied upon as a defense to the case, and the charge the court gave amounted to an instruction that the plaintiff could recover solely upon proof that the collision in which he was injured was the result of defendant's negligence, without reference to the real question in dispute, raised at the very threshold of the case by the pleadings, and towards substantiating which defendant's evidence was directed, viz: whether the plaintiff was actually employed in interstate commerce at the time of his injury. Whether he was so employed depended upon a correct construction of the Federal act sued under, and in order to put a proper construction upon the language of that act it was necessary for the court to refer to the settled and well-known meaning of the words, "*while he was employed by such carrier in such commerce.*"

In the case of *Kepner vs. United States*, 195 U. S. 100 (49 L. Ed. 120), this court, speaking through Mr. Justice Day, said (p. 121):

"In order to determine what Congress meant in the language used in the act under consideration, 'No person, for the same offense, shall be twice put in jeopardy or punishment,' we must look to the origin and source of the expression and the judicial construction put upon it before the enactment in question was passed."

And again, on page 124:

"It is a well settled rule of construction that language used in a statute which has a settled and well known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body."

This case illustrates the wisdom of a right to appeal to this court in a case of this character.

Where uniformity in a decision of State courts is necessary both the necessity for such an appeal and the burden of it are fully recognized by *Mr. Justice Van Deventer* in the decision rendered in the Employers' Liability cases, where he says:

"We are not disposed to believe that the exercise of jurisdiction by the State courts will be attended by any appreciable inconvenience or confusion; but, be this as it may, it affords no reason for declining a jurisdiction conferred by law. The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication. Besides, it is neither new nor unusual in judicial proceedings to apply different rules of law to different situations and subjects, even although possessing some elements of similarity, as where the liability of a public carrier for personal injuries turns upon whether the injured person was a passenger, an employee, or a stranger. But it never has been supposed that courts are at liberty to decline cognizance of cases of a particular class merely because the rules of law to be applied in their adjudications are unlike those applied in other cases."

(p. 13.)

If the construction of this statute was left to the determination of State courts, there might be as many varying constructions as there are States. One State court might construe the words "while he is employed by such carrier

in such commerce" to cover intra-state commerce, and extend the benefits of the act beyond the power of Congress to legislate. Another State court might declare the same clause to include only such employees as were injured while engaged in unusually hazardous occupations of interstate carriers, thereby unduly restricting and limiting the meaning and purposes of the act. It therefore necessarily follows that *if a uniform construction is to be placed upon the Federal Employers' Liability Act by the various State courts this court must clearly define its scope, meaning and effect in all its bearings as regards the relation of interstate carriers to their employees.*

II. Where a Servant Departs from the Sphere of His Assigned Duties, the Relation of Master and Servant is Temporarily Suspended, and His Position Becomes that of a Trespasser, and Not an Employee of the Defendant.

On the admitted testimony that the plaintiff was in the express car, taking either his and the conductor's explanation of why he was there, or, the explanation of Rowe, the servant had departed from the sphere of his assigned duties, the relation of master and servant was temporarily suspended, his position was that of a trespasser, or a bare licensee, and he was not at the time of the injury in the employ of the defendant.

Who are masters and who are servants, within the scope of this Federal act, must be determined by the recognized rules applicable to such questions. It has been declared by the courts of North Carolina, and with practical unanimity by most of the courts of other States and by leading text writers, that under circumstances similar to those in this case a servant ceases to be an

employee and is no more the defendant's servant than a stranger would be.

"Where a servant departs from the sphere of his assigned duty, the relation of master and servant is considered as temporarily suspended. The servant's position is then analogous to that of a trespasser, or perhaps a bare licensee, and his master owes him no duty, nor is he under any legal obligation to anticipate his deviation from his instructions, and the possible danger which may arise to him therefrom, and consequently to provide means for avoiding it. The servant becomes a volunteer as to the particular act which is outside the scope of his service and which he attempts to perform."

Patterson vs. Lumber Co. 145 N. C. at p. 44.

And again:

"Where the servant leaves his own work to do something else, for which he was not engaged, the duty of the master towards him reaches its vanishing point, as it has been said, at the moment of the transition, and his corresponding liability for a resulting injury disappears."

Discussing the same subject, an eminent author has recently said:

"If such unauthorized action is established, it is manifest that, in respect to the work thus done, the relation of master and servant did not exist between the person for whom it was done and the person who was doing it, and the former did not owe to the latter any of those special duties which are deemed to be incidental to that relation. The workman, under the supposed circumstances, occupies a position which is virtually, if not precisely, that of a trespasser or licensee."

2 Labatt, Sec. 629.

And Mr. White, in his work on Personal Injuries on

Railroads (Sec. 227), makes use of the following apposite language:

"If the employee, instead of attending to the business of the employer, at the time of the injury, was engaged upon some business of his own, or if the work done by him was outside the scope of his employment, and as the result of the performance of such outside duties he was injured, then the employer is not responsible, for in the performance of such duties the relation of employer and employee did not exist, since he was not employed to do any such service."

To like effect is the clear-cut declaration of another eminent text writer:

"If the time when, and the place where, the injury is received, are not within the scope of the contract of employment, the relation of master and servant can not be justly said to exist, and * * * where one employed to do a designated kind of work, or to work at a particular place, voluntarily undertakes to do some other work, or goes to a place different from that assigned him by the contract of employment, he can not successfully insist that he is within the protection of the rule that a master must exercise ordinary care to protect him against injury."

3 Elliott on Railroads, Sec. 1303.

III. The Plaintiff, Being Guilty of Contributory Negligence in Leaving His Post and Going to a more Dangerous Place on the Train, Contributed the Proximate Cause of His Injuries and was Therefore Not Injured as the Result of the Defendant's Negligence.

Defendant, in the second special instruction prayed for, and refused, which is the seventeenth assignment of error as contained in exception 17 (page 76, Rec.),

requested the court below to instruct the jury that if they should find by the greater weight of the evidence that the plaintiff went into the express car to assist the express messenger in his work, and while there was injured, that then the defendant's negligence would not be the proximate cause of his injury.

To this charge defendant was entitled, for even if the jury should find that the act of the plaintiff in going into the express car to help the express messenger in his work did not separate plaintiff from his employment, yet if they should find that such act was the proximate cause of his injuries, he would be guilty of contributory negligence, and the jury would answer the second issue "Yes."

On this point the court charged the jury as follows:

"If you find from the evidence that the plaintiff had no right to go into the express car, that he was not where he should have been, and you further find that he would not have been injured but for his going into the express car, and that his going into the express car was such an act on his part that a reasonably prudent man ordinarily would not have done under the circumstances of the situation, then he would be guilty of contributory negligence and it would be your duty to answer the second issue "Yes." If you do not so find, it would be your duty to answer the second issue "No."

To which charge the defendant excepted, which is the defendant's twenty-sixth assignment of error. (p. 80, Rec.)

Under the charge which the court gave on the question of contributory negligence the established principle of law which would require a jury to find contributory negligence where the plaintiff abandoned his post of duty and proceeded to a more dangerous place on the train, was ignored, and unless the jury had decided that a

reasonably prudent man under the circumstances would not have gone into the express car they would be impelled to find against contributory negligence. In other words neither the violation of the defendant's known rule, nor the admitted greater danger of a position in the car next to the engine tender, nor the rule of law that taking such a position in disobedience to the rules of the company constituted contributory negligence was taken into consideration by the jury under the above stated charge of the court. That this was error and that the charge requested by defendant and refused (17th assignment of error, p. 76, Rec.), should have been granted, we now propose to show.

Under the rule of the company requiring the baggage master to remain in the baggage car while on duty, except when acting as brakeman, the plaintiff was plainly prohibited from going into the express car to engage upon work for the express company, work entirely independent of and outside the scope of his own employment, and if injured under such circumstances, his voluntary act in proceeding into the express car, which was nearer the engine and consequently in a more dangerous position, was the proximate cause of his injury.

" It is incumbent upon a railroad employee, whose duty requires him to ride upon one of the company's trains, to ride in such places as the company has provided for such purpose, and, if he is injured while riding in a more dangerous position, the law will presume that his negligence contributed to such injury. But this presumption may be overcome by evidence that such employee occupied such dangerous position through no fault or negligence of his own and not of his own free will."

Bailey on Personal Injuries (1912), 2d ed. p. 1405.

" But upon the point that the deceased was between the freight cars, and riding there to keep out

of the wind; that his duty did not call him there; that it was against the rules of the company for brakemen to ride there; * * * are all facts proved in this case, and upon which there is no conflict of evidence.

"It is a general rule of law that no one can recover for an injury of which his own negligence was in whole or in part the proximate cause. Redfield on Railways, 330, *et seq.*"

McAunich vs. The Miss. & Mo. R. Co. 20 Iowa, 345-6.

See also Bailey on Personal Injuries, 2d ed. Vol. II, pp. 1406-7.

Thus while the action of the plaintiff in going into the express car from the baggage car did not have a cause and effect relation to the head-on collision or wreck, which happened entirely independent of such action on his part, it did contribute to the injuries received by him to the extent that it took him into a more dangerous position on the train, into the car that was completely demolished and that was telescoped by the car from which he had come. The evidence shows that while the baggage car was also derailed and overturned that it was much less damaged than the express car (pp. 41-45, Rec.), and it is a matter of common knowledge that a car which is telescoped is a more dangerous place for its occupants than is the car which does the telescoping. Had the plaintiff remained where the rules required him to be he might not have been injured seriously, if at all.

Plaintiff's counsel, attempting to show that plaintiff should recover despite his leaving his proper place on the train and going into a more dangerous one, cites several authorities which are not in line with the facts in this case. Quoting from 2 Wood's Railway Law, p. 1262, he says:

"If the sole immediate cause of the injury was

the defendant's negligence, the plaintiff can recover notwithstanding previous negligence of his own."

It certainly can not be seriously contended from the record testimony, that plaintiff has proved that the defendant's negligence was the *sole immediate cause of his injury*, when it is admitted by the plaintiff that he left the baggage car against the express rule of the company and went forward into the car immediately behind the engine tender, admittedly the most dangerous car of the train. Under the rule of law laid down by Bailey on Personal Injuries and Redfield on Railways as cited above, such action on the part of the plaintiff certainly contributed to his injury, and the defendant's negligence was not the sole immediate cause of his injury.

See also Bailey on Master's Liability for Injuries to Servant, p. 414.

Patterson vs. Lumber Co. 145 N. C. 42.

Stewart vs. Carpet Co. 138 N. C. 60, 2 Labatt, Sec. 635.

The following case from which we cite at some length because it is so apt, illustrates the principle of law that where the servant of a railroad leaves the post to which he has been assigned by rule and takes a more dangerous position voluntarily, his own act is considered as the proximate cause of his injuries, even though the accident or wreck has been caused by the negligence of the carrier.

"The defendant introduced in evidence a rule of the company, a copy of which every conductor and brakeman was accustomed to carry, which is in these words: 'Rule 37: conductors and brakemen of all trains meeting or passing, or when approaching or passing a station, must be out and prepared to do anything required for safety or expedition.' The plaintiff, to destroy the force of the evidence, offered as witnesses the engineer of the train and other

persons who had been in the employ of the defendant, to prove that it was and had always been the usage and custom of brakemen on the defendant's road to be on the locomotive or in the engineer's cab, as they pleased, when approaching and passing Comstock Station, unless the train stopped there or there was a whistle to call them to the brakes.

* * * The object of the offered evidence was of course, to show that the rule in question had been waived by the defendant to such extent that it was not a violation of duty on the part of said Maurice O'Neill to leave his brakes under the circumstances of the case and be riding on the locomotive at that time. Without considering whether the rule could be regarded as waived by any less formal or authoritative action than that by which it was adopted, it seems clear that it could not be so regarded by reason simply of a custom, on the part of those for whom it was made to violate it. Acquiescence by the company in the custom of violating the rule should be shown, and this would involve the necessity of showing at least knowledge on the part of the officer or agent charged with the enforcement of the rule that it was customarily violated.

"At the request of the defendant the Court gave an instruction which is in these words:

" No. 3. If Maurice O'Neill was injured while on the engine and in consequence of being on the engine, and if he was there voluntarily and in disobedience to the rules of the company requiring him to be at another place, then the Court informs you that the servant may not, for his own convenience or comfort, abandon his post except at his own risk; and if said O'Neill voluntarily exposed himself the plaintiff can not recover in this action, and you must find for the defendant, and you must so find even if you should believe that the accident was caused by the negligence of the company or its agents."

O'Neill vs. The Keokuk & Des Moines R. Co. 45 Iowa, 547-8.

Also in *Connors vs. B. C. R. & N. R. Co.* 74 Iowa, 382, it was held that where the rules of the defendant company required plaintiff to go on top of the cars and be ready to apply the brakes when the train was approaching a station, and the said plaintiff, the brakeman, disregarding said rules, was riding in the cab of the engine at the time it left the track and was killed, no action lay against the railroad company even though the cause of the accident was the negligence of the railroad company in the manner in which the train was being run and the condition of the track.

And see

Abend vs. Railway Co. 111 Ill. 202.

Lehigh Valley R. Co. vs. Greiner, 113 Pa. St. 600.

Doggell vs. Railuway Co. 34 Iowa, 284.

"An employee is bound to obey all of the reasonable rules of his employer with reference to the conduct of his business. Disobedience of such rules, if it contributes directly to the injury of the employee, conclusively charges him with negligence, which will bar any recovery of damages for his injury. *Green vs. Brainerd & A. M. Ry. Co.* 85 Minn. 318, 88 N. W. 974."

Nordquist vs. Great Northern Ry. Co. 489.

Bailey on Personal Injuries, Secs. 3332-3398a.

Amer. Neg. Rep. 435-441.

In the 18th assignment of error, the court below was asked to instruct the jury that since the plaintiff admitted that he was in the express car at the time of his injury, and since the rules of the company required him to remain in the baggage car, that the burden was upon him to satisfy the jury by the greater weight of evidence that when he went into the express car and was injured he was engaged in the discharge of the duties of his employment, and his failure to so satisfy them must relieve the defendant of liability.

To this instruction we contend the defendant was clearly entitled, for unless the plaintiff was injured while in the performance of his duties of employment he would not be entitled to recover under the Federal Employers' Liability Act, and if leaving his post of duty and going into the express car was acting without the scope of his employment, then he certainly is precluded from recovering under the Act of April 22, 1908, which provides that

"every common carrier by railroad while engaging in commerce between any of the several States or Territories, * * * shall be liable in damages to any person suffering injury *while he is employed by such carrier in such commerce.*."

As the plaintiff was suing under this Act it was necessary, in order to recover, to show that he was injured *while employed in interstate commerce*, and the burden of proof was upon him to show that he was engaged in the discharge of his duties, that is, engaged in interstate commerce, before he became entitled to recover under the Act. Therefore the court should have instructed the jury that the burden of proof was upon the employee to show that he was engaged in the performance of his duties of employment when he went into the express car, and that upon his failure so to do they should answer the first issue, "No."

This principle is also clearly enunciated in the following citations:

"Again, we think that, under the decisions of this and the courts of other States, the judge should have instructed the jury that, the plaintiff being an employee of the defendant, before he was entitled to recover it was necessary for him to have shown affirmatively that, at the time he was hurt, his duty required him to be at the place where the injury

occurred. There is no dispute, as we gather it from the record, that his duties were those of a flagman, and that whilst the train was in motion his place was in the rear car, that he might discharge the duties of his position. It is however said, that he had other duties which, on occasion, might call him to other parts of the train. If this be admitted, then we have the fact that the proper place for the plaintiff was in the rear car, unless special duty called him to the front, and being hurt in that part of the car, he was bound to show that he was there in the discharge of such special duty. * * * Even if he had duties calling him there, he should have attended to them, and returned without delay, unless he chose to take the risk of an accident such as this without the liability of the defendant to answer therefor.

"If the fact be that an emergency or duty required his presence in dangerous proximity to this stove, when, without such emergency or duty, his place, as he swears himself, was in the rear car, then he should show affirmatively the facts making the emergency or duty. This rule was clearly laid down in the case of the *Central Railroad vs. Sears*, 61 Ga. 279."

Atlanta and Charlotte Air Line Railway vs. Ray,
70 Ga. 678-9.

"Condon, at the time of the accident, was acting outside the scope of his employment, without the express or implied authority of the defendant; a mere volunteer, for whose act it was not responsible, and for whose government, while so acting, it was under no obligation to make rules or regulations."

Moran vs. Rockland T. & C. St. Ry. 99 Me. 127
(1904).

In *Filbert vs. New York, N. H. & H. R. Co.* (N. Y. 1906), 184 N. Y. 522, affirming 95 App. Div. 199, a judgment on a non-suit was affirmed where a head brakeman was caught and crushed between two cars of his

train in a collision. There was no reason why he was between the cars and the rules required him to be at the head of the train and on top of the cars.

20 Amer. Neg. Rep. 671.

Nordquist vs. Ry. Co. 89 Minn. 485.

Scott vs. Ry. Co. 90 Minn. 135.

Ry. Co. vs. Jones, 95 U. S. 439.

In *Chatt. Ry. Co. vs. Myers* (Ga.), 37 S. E. 439, the duty of the plaintiff's intestate required him to be at the brakes on the front cars, and the rule of the company forbade his riding upon the engine. There was a derailment of the engine and the front cars as the result of the defendant's negligence. The plaintiff's intestate, who was in the engine at the time, was killed as the result of said derailment. In denying the right to recover, the court said:

"In the case under consideration the plaintiff's husband voluntarily left his place of duty—the top of the front cars—and got upon the locomotive, obviously the most dangerous part of the train moving forward, in a place where there was no duty whatever for him to perform, and was riding there when the derailment occurred which caused his death. *Had he remained where his duty required him to be, he might not have been injured.* [Italics ours.] He was outside of duty, and at fault, and consequently his widow was not, under the authorities above cited, entitled to recover damages for his homicide."

In the light of the evidence as to plaintiff's voluntarily leaving his post of duty, we will here discuss the error involved in the said sixth assignment of error found on pages 80 and 105 of the Record.

The trial judge in the State court presented to the jury the issue of contributory negligence arising out of the conflict of the evidence hereinbefore pointed out as to

whether Duvall was properly in the express car at the time of the impact of the trains, but he added these words in presenting the issue, "*and that his going into the express car was such an act on his part that a reasonably prudent man would not have done under the circumstances of the situation.*"

The foregoing italicised words show clear and palpable error. It needs no argument. The rule of the prudent person as between the master and servant can not possibly arise if it is made to appear that the injury proceeded from the violation of a rule by the master. If that is not true then a servant may at any time substitute his judgment for that of the master.

The following illustration will show the utter absurdity of applying the rule of the prudent person to an issue of contributory negligence.

A is a rear brakeman on a train engaged in interstate commerce. The railway promulgates a rule to the effect that "*rear brakemen must remain at their posts of duty at the rear end of the train.*" *A* concludes that he will go up and ride on the engine. His work does not carry him there. While so riding on the locomotive there is a head-on collision and he is seriously injured. He then brings his suit under the Federal Employers' Liability Act in the State court. The head-on collision presumes negligence on the part of the railway. The railway on the trial of the cause introduces evidence to show that if *A* had not violated the rule and had remained at the rear end of the train he would have suffered no damage. The railway can not have a diminution of the verdict unless it can be found by the jury that the injured party was guilty of contributory negligence. So, then, the judge proceeds to charge the jury, as was done in this case, that there can be no contributory negligence unless *A acted imprudently in violating the rule.*

A. THE PLAINTIFF HAVING DEPARTED FROM THE SPHERE OF HIS ASSIGNED DUTIES, THE RELATION OF MASTER AND SERVANT WAS THEREBY SUSPENDED, AND THE DEFENDANT CONSEQUENTLY OWED HIM NO GREATER DUTY THAN IT OWED A TRESPASSER OR A BARE LICENSEE.

As further bearing upon the question as to what was, in law, the proximate cause of plaintiff's injuries we propose to show that because the plaintiff had *deserted his post of duty* and gone elsewhere to voluntarily assist the servant of another corporation to discharge his duties, the relation of master and servant was thereby suspended and, consequently, the defendant no longer owed him the duties incident to such relationship, or in fact, *any* duty, other than not to *wilfully or wantonly* injure him—the plaintiff for the time being occupying the position of a trespasser upon the defendant's train.

If this is a correct proposition of law (as we shall presently show), then, in a legal sense, the plaintiff was *not* injured as the result of the defendant's *negligence*, as the bare proof of a collision furnishes no evidence that said collision was either *wanton* or *wilful*. (*Bailey vs. Railroad*, 149 N. C. 169). Therefore, the material inquiry, after all, is whether, upon the defendant's theory of the case, the relation of master and servant was suspended while the plaintiff, in violation of the known rules of the company, was in the express car, and if so, whether, *for the time being*, the duties incident to said relationship were likewise suspended. In other words, whether the voluntary separation of himself from all his duties by the plaintiff did not operate as the proximate cause of his injuries.

In the leading case of *Olsen vs. Railroad*, 76 Minn. 149, it appeared that, on arriving at a terminal yard, a brakeman on one of defendant's freight trains, in

accordance with an established custom, changed his clothes, leaving his working suit in the caboose car of his train, and was subsequently injured while stepping from the caboose car of *another* train, where he had been to look for his clothes, by being struck by a switchstand which it was alleged was negligently placed too near the defendant's track. In holding that the plaintiff was not entitled to recover, because at the time he was not *in the service* of the defendant, the court said:

"It does not follow from the fact that they (the brakemen) were licensed to remove their clothing from the caboose, that the right could be exercised at all times and under all circumstances, or that an unreasonable use of the license could be made. It is elementary that the defendant company owed no duty to the plaintiff if he was not, when injured, engaged in serving it in the line or within the scope of his employment. Although he was in its general service, the defendant could not be liable for injuries received while the plaintiff was engaged in an enterprise foreign to his employment. If Olsen was acting for himself when he got on the way car or when he got off and entered the switch, and was not exercising his right as a licensee in a reasonable manner, the defendant did not fail in the performance of its obligation, was not derelict, and is not liable for the unfortunate result. * * * It was not negligent if, at the time and under the circumstances, it owed him no duty."

In *Manning vs. Polk* (Ga.), 41 S. E. 1015, the plaintiff, a minor, was injured while working with defective machinery in the defendant's plant. The defendant set up the defense that at the time of the injury the plaintiff was working under his father, an employee, learning the business, and that consequently he was not in the employment of the defendant. In holding that the trial court,

by an appropriate charge, should have presented the defendant's theory of the case to the jury, the Appellate Court said:

"Aside from any other criticism of this part of the charge, it is sufficient to say that the plaintiff in this case based his right to recover on the allegation that he was in the employment of the company at the time he was injured, and that the latter was negligent in failing to furnish him, as an employee, machinery reasonably safe for the work in which he was engaged. * * * Under the petition, if the plaintiff was entitled to recover, he could only do so on the ground that he was an employee and injured by the negligence of the master. There is no allegation that the company owed him any other duty than as its employee. * * * And while the question whether he was an employee or a volunteer was raised by the answer; and while the issue thus raised was a proper subject of inquiry, if it had been satisfactorily proved that the plaintiff was a volunteer and not a servant of defendant, he would have no right to recover under the allegations of his petition."

This case is quoted somewhat out of its place, for the purpose of *emphasizing* the fact that in the case at bar the plaintiff *only seeks in his complaint* to recover as an *employee* of the defendant, injured *while in the discharge of his duties*, and that, therefore, if he recovers at all, he must recover *according* to the allegations of his complaint, and consequently the question of his right to recover as a *licensee* does not here arise.

A case more squarely in point is that of *Allen vs. Hixon* (Ga.), 36 S. E. 810, where the plaintiff was injured by a defective machine which she was employed to operate, while she was voluntarily showing the superintendent of the defendant the exact nature of the defect in the

machine, so that he might repair the same. In denying her right to recover, the court said:

"It affirmatively appears that it was her duty to feed the machine by which she was injured, and it is a legitimate inference that it was also incumbent on her to inform the superintendent that this machine was out of order. Beyond this, it can not be gathered from her petition that anything more was required of her. It is therefore clear that she was not injured in the performance of any duty growing out of the service in which she was injured. It follows that the master was under no duty of protecting her from injuries received while she was, as a mere volunteer, endeavoring to accomplish something entirely outside the scope of her employment."

If this was so in the case of an employee who was acting outside the scope of her employment *for* her master, it should certainly be so in the case of the plaintiff, who, according to the defendant's contention, had *deserted his post of duty* and was *not* acting for the master at all, at the time of his injury.

Another case in point is that of *Stagg vs. Tea Co.* (Mo.), 69 S. W. 391, where the plaintiff, the superintendent of the defendant's plant, was injured while operating and riding a freight elevator, where his duties did *not* require him to be. In holding that he could not recover because he was injured while acting outside the scope of his employment, the court said:

"The general rule unquestionably is that the master is not liable for injuries to his servant unless the servant was, at the time, in the performance of some duty for which he was employed * * * The petition is utterly barren of any allegation that it was the duty of Mr. Stagg to use this elevator or to operate it, or that his business required him to use it."

To the same effect is *Duvall vs. Packing Co.* (Mo.), 95 S. W. 978, where the plaintiff, who was employed to weigh packages of mincemeat in the defendant's plant, was injured while temporarily operating a mincemeat press, situated in the same room where she was employed to work, and in denying her right to recover, the court said:

“There is no doubt that, if an employee voluntarily leaves the work for which he is engaged by his employer, and engages in other work for such employer, and while at the latter work is injured, he can not hold the employer liable.”

In the case of *Lindquist vs. Plaster Co.* (Iowa), 117 N. W. 46, the plaintiff's intestate left his employment to assist another workman in mending a belt, and was killed while so doing. He had been ordered not to go near the belt, and in holding that he was a mere volunteer and that his administrator could not recover, the court said:

“The facts so recited clearly show that while the defendant was at fault in not properly constructing or guarding its machinery, and that a jury may have found its failure in this respect was the proximate cause of the injury, yet it does not sufficiently appear that the defendant owed any such duty to the plaintiff as to make its failure actionable negligence.”

Here it will be noted that the plaintiff's right to recover was denied upon the *sole* ground that the defendant *owed* the intestate no *duty*, because at the time he was killed he was acting *beyond* the scope of his employment, though the defendant's negligence was probably the proximate cause of the death, yet such negligence not being actionable, no recovery could be had.

In the case of *Wright vs. Rawson*, 35 Am. Rep. 275, plaintiff's intestate was killed while going into a part of

the defendant's mine, where his duties as a servant did *not* require him to be. In denying the right to recover, the court said:

"When the accident happened it clearly appears that the intestate was not engaged in mining, which was his employment; that his proper place was not in the room where he was injured; but, on the contrary, he was a volunteer there, for his own pleasure or amusement. The intestate, not being engaged in his own employment, was in the same position as a visitor to the mine."

We submit that the last-cited case is direct authority for the defendant's position in the case at bar, that if the jury should have found, under appropriate instructions from his Honor, that the plaintiff was injured while in the express car, either for his *own pleasure* or to *assist* the express messenger in his *work*, then no recovery could be had in this action.

But more strikingly in point is the case of *Southern Railway vs. Guiton*, 25 So. p. 34, where the plaintiff, a section hand, was injured on a hand-car, and the defendant contended that he could not recover because he was acting beyond the scope of his employment when he was injured. The Appellate Court, in holding that the trial court erred in refusing to submit this view of the case to the jury, said:

"Appellate's charges numbers 10 and 11, should have been given. If an employee quits the work assigned him by his employer, and voluntarily undertakes to do work about which he has no duties to perform, by virtue of the contractual relation existing between him and his employer, then, while such condition exists, the duty growing out of that relation of using care for his safety does not rest on the employer. Therefore the rule obtains that to hold an employer liable as such for injury resulting from

breach of such duty, it must appear that the employee was at the time of the injury acting within the scope of his employment."

The case of *Green vs. Railway* (Minn.), 88 N. W. 975, is probably more strikingly in point than any heretofore cited, as there the plaintiff was a rear brakeman on defendant's logging train, and was ordered to ride on the rear car. When injured, he was riding on the rear foot-board of the engine, and as the train was moving slowly he stepped off for some unknown reason, and as he did so a log rolled off the car and injured him. In denying his right to recover, the court said:

"If at the time when, and the place where, the injury is received are not within the scope of the contract of employment, the relation of master and servant can not be justly said to exist, and no recovery can be had against the defendant in the character and capacity of an employer or master. Where one employed to do a designated kind of work, or to work at a particular place, voluntarily goes to a place different from that assigned by the contract of employment, he can not successfully insist that he is within the protection of the rule that the master must exercise ordinary care to protect him against injury."

To like effect is the case of *Shadoan vs. Railway* (Ky.), 82 S. W. 567, where the plaintiff's intestate, a brakeman in the service of the defendant, while his train and another train were standing at the station waiting for a third to pass, went on the engine which was attached to the other train to get a drink of water; and while there his train began to move, which resulted in a collision between the two trains, in which he was killed. In denying the right to recover, the court said:

"Assuming that the collision of the trains was the

result of the negligence of appellee's servants, we think that the trial court ruled correctly in granting the peremptory instruction complained of. Appellant's decedent was on Train No. 35 for his own convenience, and not in the discharge of any duty to appellee. In the case of *Railway Co. vs. Hocker* (Ky.), 64 S. W. 638; 65 S. W. 119, one of the employees of the railroad company, for his own convenience, had gone between cars in its yard, where he was injured (it was alleged) by the gross negligence of its employees in backing the train against the cars between which he was standing. In the opinion it is said: 'It seems to us, from the undisputed facts of this case, that as the appellee was not in his place of business, or in the discharge of any duty imposed upon him by his employment, the appellant company owed him no duty, except to avoid injuring him after it had discovered his perilous position.' This principle is conclusively shown in the case at bar, and the judgment is affirmed."

In *Whitton vs. Railroad* (Ga.), 32 S. E. 857, plaintiff's intestate was a conductor of a wrecking-train of defendant, and was killed while uncoupling cars, which work was the duty of the flagman. In denying the right to recover, the court said:

"In the present case there is nothing in the evidence to show that it was the duty or any part of the duty of Whitton, the conductor, to uncouple cars, or that there was any pressing emergency upon him to do so, in order to save life or limb, or to prevent a collision with another train. According to the ruling of the case of *Ray vs. Railroad*, 70 Ga. 674, the plaintiff in the case below should have shown affirmatively that at the time her husband was injured his duty required him to be at the place where the injury occurred."

In *Kennedy vs. Chase* (Cal.), 52 Pac. 33, the plaintiff was employed by defendant to assist in unloading a vessel

on to a lighter, and before doing so removed his coat and placed it at a point on the vessel away from where the other employees placed their coats. In going to get his coat, after his work was completed, he fell into an unguarded hatchway and was injured. In denying the right to recover, the court said:

"In going where he did, he not only went entirely out of his way, but was in pursuit of an object relating solely to his own personal convenience; and while, perhaps, not in strictness a trespasser, he was, at best, but a mere licensee at sufferance, to whom the defendant, at the time, owed no duty."

The case of *Freeman vs. Brewing Co.* (Texas), 85 S. W. 1165, is also very much in point. There the plaintiff was employed by defendant in its bottling department, and was injured in taking a keg from a stack of kegs in the warehouse, which was in a separate and distinct department from the bottling department, and under a separate foreman. In sustaining an instructed verdict, the court said:

"From the undisputed facts it follows that, in respect to the work plaintiff was doing when he claims to have been injured, the relation of master and servant did not exist between him and the defendant, and the latter owed him no duty incident to such relationship. Under the circumstances, his position was virtually that of a trespasser or licensee. Labatt Master and Servant, secs. 435, 439."

In *Bryan vs. Railway* (Texas), 90 S. W. 693, the plaintiff, a section foreman, was injured while unloading cattle-guard timbers from a coal car, which he testified was not in the line of his duty. In sustaining the trial judge's refusal to give a certain instruction, the court said:

"According to plaintiff's own testimony, he was injured while at work in a separate and distinct de-

partment from the one in which he was employed; and, therefore, while doing such work, the relation of master and servant did not exist between him and the defendant."

In *Wilson v. Railway* (Ky.), 113 S. W. 101, plaintiff was employed at night work in the defendant's round-house, and was injured while going across its yards to get a meal at a nearby restaurant, which was not on defendant's premises, though it knew of the custom of its employees to patronize the restaurant at night. The plaintiff was injured by stepping into an uncovered hole full of hot water in the defendant's yard. In holding that the plaintiff was not entitled to recover, the court said:

"It seems to us, from the undisputed facts in this case, that as appellee was not in his place of business, or in the discharge of any duty imposed upon him by his employment, the appellant company owed him no duty, except to avoid injuring him after it had discovered his perilous position."

In *Pioneer Mining Co. vs. Talley* (Ala.), 43 So. 800, plaintiff left his entry or shaft, and went of his own volition to another shaft to get his tools which he had lent to another miner, and while in the other shaft he was injured by a slate falling from the roof of the shaft. The court, in denying the right to recover, said:

"It must be conceded, as contended by defendant's counsel, that when the plaintiff is injured in a place where he has no right to be, or if he goes out of his employment for some private purpose, and not on his own employer's business, he has no cause of action against his employer. That seems to be the well-established rule. Dresser Employers' Liability, sec. 104."

The eminent author referred to in the above-quoted decision, in discussing the subject, says:

*"Where a servant, of his own accord, and without the direction of his master, steps outside the scope of his employment, whether on the master's business or on his own business, the master owes him no duty as to the dangers he encounters, and is not liable for any injury received. * * **

"When the plaintiff is injured in the place where he has no right to be, or by machinery which the scope of his employment does not require him to use, if he went out of his employment for some private purpose and not on his master's business, he has no cause of action against the master."

In the recent case of *L. & N. R. R. Co. vs. Pendleton* (Ky.), 104 S. W. 382, plaintiff's decedent, who was employed by defendant in its car-inspection department, was killed while voluntarily assisting the switching-crew, by being crushed between the car on which he was riding and a coal car on another track, in pursuance of a custom known to the defendant's agents. In denying the right to recover, the court said:

"Therefore, although Pendleton, at the time of his death, was engaged by appellant as car inspector and repairer, and in this employment the relation of master and servant existed between them, with all its attendant duties and obligations, yet it did not continue when without authority or direction he voluntarily undertook the performance of other duties entirely disconnected with those for which he was engaged. In performing these new duties he occupied towards his employer or master the same relation as if he was an entire stranger. His attitude in assisting the switching crew was the same as if he had quit his work as clerk in a store or as laborer on a farm to undertake them."

Another strong case in support of the defendant's contention is *Russell vs. Railroad* (C. C. A.), 155 Fed. p. 22, where action was brought to recover for the death of the

foreman of a bridge-construction gang, who quit work at 12 o'clock and went on a velocipede to a point several miles away to look at some land which he had bought. He sent the velocipede back, and later in the evening several of his men came for him on a hand-car to take him back to the place where he was at work. In returning, the car was run into by a special train of the defendant, and plaintiff's intestate was killed. The negligence charged was running the train at a high rate of speed through a city without a headlight. In sustaining the judgment of the lower court in directing a verdict for the defendant, Judge Hunt said:

"Under this evidence, the conclusion is certain that his act in remaining until 8.30 o'clock was his own, and that when returning, when and in the manner that he did, on the hand car, he was acting for himself. His conduct was no part whatever of any business relation of master and servant. It must be held, therefore, as a matter of law, that his attitude became that of a servant who voluntarily stepped wholly aside from the business of the master to do his own pleasure exclusively. Under such conditions the master is not liable for the servant's death."

The court then cites numerous cases, both State and Federal, in support of its conclusion, some of which have already been referred to in this brief.

In the more recent case of *Gross vs. Lumber Co.* (La.), 43 So. 1006, one phase of the facts, which sufficiently appears in the following quotation, is strikingly like the facts in the case at bar. The court said:

"There is no basis of fact or law upon which the defendant can be condemned in this case. Plaintiff's minor son was not employed to operate the saw by which he was killed, and was operating it at the time of the accident, not by directions of any one

connected with the defendant, but by his own volition and for his own purpose. The saw apparatus was not even part of the machinery of the mill which it was his duty to oil, but was a separate machine, which had been turned over to the control and use of a third person, and with which defendant had no connection, save that it owned it; that it occupied a place in the rear of its building; that it furnished the motive power needed for its operation, and that when the person who had control of it was not using it himself, it was at times used by its officers and employees for the sawing of fuel for themselves and families. The judgment appealed from is accordingly affirmed."

Numerous other decided cases might be cited in support of the defendant's contention in this respect, but we are fearful that we have already taken too great a liberty with the patience of the Court in devoting so much of this brief to the point under consideration, and our only apology for doing so is the fact that the court below seemed to be not at all impressed with the defendant's argument, supported by these and other authorities.

The general principles of law upon which the special instructions, assignments of error, 16 to 24 (pages 75-77, Rec.), were based, and prayed for by the defendant, are twofold:

1. That the plaintiff was acting outside the scope of his employment when injured, and that there was, therefore, no relation of master to servant and that no recovery should be had under the Federal Employers' Liability Law.

And—

2. That the voluntary act of the plaintiff in leaving his post of duty and, in direct violation of the rules of the company, proceeding to a more dangerous

position on the train, even if it did not sever his relation to the company as servant, rendered him guilty of contributory negligence and was the proximate cause of his injuries. And by this we mean the proximate cause of his injuries, not of the wreck.

As this court well said in *Louisiana Mut. Ins. Co. vs. Tweed*, 7 Wall. 44-53:

"Under these circumstances, we have had cited to us a general review of the doctrine of proximate and remote causes, as it has arisen and been decided in the courts in a great variety of cases. It would be an unprofitable labor to enter into an examination of these cases. If we could deduce from them the best possible expression of the rule, it would remain after all to decide each case largely upon the special facts belonging to it, and often upon the very nicest discriminations."

The testimony of record, to our mind, clearly shows this to be a case where the voluntary act of the injured person constitutes the proximate cause of his injury. The view most favorable to him, of the testimony, only proves that he went into the express car with the consent of, but not under the order of, the conductor. He clearly had no duty to perform in the said car and no effort has been made to prove that he did have such a duty. And the court will recognize the fact that the car next to the tender is much more dangerous than the succeeding one. Plaintiff states that there is not a line of evidence in this case indicating that the plaintiff would not have suffered serious injury in the baggage car, and then quotes from Elliott on Railroads, Vol. 4, Sec. 1631, to show that a baggage car is a known place of danger in that it is placed next to or near the locomotive and "in cases of collision it is the

first car to give way to the shock, and frequently is the only one seriously injured."

This citation must have been made without due thought because it is apparent that what Elliott states about a baggage car applies, in the case at bar, to the express car, which was next to the tender and which occupied the place the baggage car usually occupies on shorter trains.

As to whether defendant in error would have received serious injuries in the baggage car is a purely problematical question. All the probabilities are that he would not have been as seriously injured as he was, because of the less damaged condition of the baggage car as compared with the express car, and because the negro passengers in the rear part of said baggage car were not seriously injured.

The evidence shows that the express car was in front of the baggage car; that it was heavily loaded; that when the derailment occurred it was literally torn to pieces and a great number of heavy packages piled upon the plaintiff, etc. On the other hand, the testimony shows that the baggage car was a half-passenger and half-baggage car, the colored passengers occupying the rear half and the baggage the front half; that the five colored passengers were but slightly injured, the car having telescoped the express and, though overturned, was practically intact, except the front end which ran into the express car. From this brief statement the evidence would certainly tend to show that the plaintiff would have been in much less danger if he had remained in the baggage car, at his post of duty, than he was in the express car.

We have, therefore, the undisputed fact that the rules of the defendant prohibited him from going into the express car at the time he did go there; no order of the conductor of the train which might or might not

abrogate said rule, requiring him to go into said express car, and the further fact that the place to which he voluntarily proceeded was more dangerous than his post of duty; considering all of which facts it appears to be a plain case where the voluntary act of disobedience of plaintiff to the express rule of defendant constituted the proximate cause of his injury, and the jury should have been so instructed by the court below.

Instructions granted by the court ignore the principle of law governing the effect upon the relation of master and servant of the plaintiff's desertion of his post of duty and disobedience to the rules of the company requiring his presence in the baggage car. Under the court's instructions, to secure a verdict in favor of the plaintiff it was only necessary for the jury to find that the collision had been caused by the negligence of the defendant, which was admitted, and that the act of the plaintiff in going into the express car was such an act on his part that a reasonably prudent man would have ordinarily done under the circumstances of the situation. The court ignored the principles of law that the separation of the employee from his duties operated, *first*, to sever his connection with interstate commerce; *second*, to terminate, for the time being, the relation of master and servant; and *third*, that if an employee in disobedience to a known rule of the company voluntarily leaves the position on the train assigned to him and takes an admittedly more dangerous one, that such an act on his part is in law held to be the proximate cause of his injury and the jury should be so charged.

The defendant, therefore, was prejudiced not alone by the failure of the court to grant the special instructions prayed, but by the granting of the instructions actually given by the court, to which exceptions were taken and which constitute the 25th and 26th assignments of error (p. 80, Rec.).

Excessive Damages.

Exception 27. Defendant moved the court to set aside the verdict because the damages were excessive, and showed that the jury could not, in rendering the same, have been governed and controlled by the testimony in the case. This motion was overruled. (p. 8, Rec.)

Considering the law which authorizes the plaintiff to recover when guilty of contributory negligence but provides that the damages shall be diminished in proportion to the amount of negligence attributable to the plaintiff, we think that in view of the damages here given, of \$30,000.00, it is clear that under the circumstances of the case the jury did not properly observe that rule, and that the damages were given upon the theory that owing to the head-on collision the plaintiff was entitled to recover regardless of any limitations upon the defendant's responsibility occasioned by the relation of master and servant, or as affected by the violation of defendant's rules by the servant, or the servant being in a place he had no right to be under the rules, and not there about the business of the master, and the motion should have been granted.

The Decision of the Supreme Court of North Carolina was Based upon an Erroneous Conception of the Testimony as the Same Appears in the Record.

The opinion is short, scarcely a page. Following the statement that

"the defendant contends that under the Federal Employers' Liability Act the plaintiff is not entitled to recover,"

for three enumerated reasons we have discussed in this brief what purports to be a statement of some of the facts of the case.

The Supreme Court of North Carolina is an appellate court, and has jurisdiction only to review *questions of law*. In a case tried before a jury, and appealed to it, that court has no jurisdiction whatever to determine what the facts were in the case. We appreciate the weight that would naturally be given to a statement from a source so high, as to what the facts were, and where the facts did not appear for themselves in the record which was before this court, we apprehend that from such a source a statement of the facts might even be accepted as conclusive. The facts of this case, however, are here and part of the record for review by this court.

The Supreme Court of North Carolina had no jurisdiction to make the finding of any fact, and neither this court, nor the plaintiff in error here, is bound by its statement of what any fact was upon which to predicate its opinion. This case comes here on writ of error, in a very different way, than would a case come on appeal from a court authorized to find the facts as well as the law. For instance, the Court of Claims, which is authorized to find the facts as well as the law, and which findings of fact are final on a review here. No such status exists, as to a case brought to this court under the jurisdictional act, from a decision by the Supreme Court of North Carolina. That court had only jurisdiction to pass on the law of the case. If to determine whether the Supreme Court of North Carolina denied to the defendant the right of having a Federal statute construed correctly it becomes necessary to consider some of the evidence which was before that Supreme Court, such evidence must be considered as it is found in the record, and in the place of such consideration there can not be substituted an unwarranted statement by the Supreme Court of North Carolina of what certain facts were,—a statement which is binding upon no one.

Neither before the Supreme Court of North Carolina, nor before this court, is there a question of the determination of what were the facts in this case. But the question is, whether instructions upon a construction of a statute of the United States were denied, which would lead, or on possible findings of fact from the evidence might lead, to a judgment in favor of the plaintiff in error here. (*St. L. & I. M. R. R. Co. vs. Taylor*, 210 U. S. 281.)

Without entering upon a controversy as to the truth of evidence, we are constrained to show that there was evidence on which, in its aspect most favorable to us, we were entitled to a construction of the statute as applicable thereto.

(1) It is stated in the opinion of the North Carolina Supreme Court that:

“The uncontested facts are that the plaintiff was baggage master and flagman, and *was so employed at the time of the injury.*”

(p. 91, Rec.)

Whereas, the defendant offered evidence which was admitted, that the plaintiff *was not at the time of the injury* employed as baggage master and flagman, or in any other capacity by the carrier he was serving (Rec. p. 34) but on the contrary, had abandoned his post of duty in the baggage car, and in violation of the known rules of the receivers (Rec. p. 46), had been in the express car for some half hour prior to the collision, engaged in assisting the express messenger in the discharge of his duties (Rec. p. 34).

We can conceive of no possible way whereby the court arrived at the conclusion that the fact was uncontested that the plaintiff was baggage master and flagman, and *was so employed at the time of the injury*, save by a con-

struction of the act by the court at variance with our view of the law governing this case. To state it in another way, the court is giving its views of the legal effect of the evidence showing that the baggage master had abandoned his place of duty in the baggage car, and in violation of known rules of the receivers had for some half hour before the collision been in the express car, engaged in assisting the express messenger.

In other words, we can not conceive that the Supreme Court of North Carolina means that it did not have evidence before it that the plaintiff knew of the rules of the road, or that he was not, at the time he was injured, in the express car assisting the express messenger and not in the baggage car, where the rules of which he knew required him to be. But, on the other hand, that the court considered that his being there under those circumstances was, under the court's construction of the law, immaterial as bearing upon the provision of the law, that he must, *at the time of his injury, have been employed by the carrier in interstate commerce.*

While in what follows the court makes certain statements as facts, what is quoted above is the only thing referred to by the court as uncontroverted fact.

(2) It is also stated that

"But the fact is that his duties called him to the express car, as well as to the baggage car."
(p. 91, Rec.)

Whereas, the defendant offered evidence which was admitted, not only that the plaintiff *had no duties to perform in the express car on the night of the injury* (testimony of Rowe, p. 34; Wren, p. 45, Rec.), but on the contrary, that *he was there in express violation of the known rules of the company* (Rec. p. 46), and *was actually engaged in assisting the express*

messenger in the discharge of his duties, when injured (Rec. p. 34).

(3.) It is also stated that

"There is no evidence that being in the express car in any wise enhanced his (plaintiff's) risk, or contributed to his injury,"

and that

"In fact, the probabilities are that had he remained in the baggage car he would have been more seriously injured, or possibly killed by the trunks falling upon him. The evidence is that the baggage car was more seriously damaged than the express car."

(p. 91, Rec.)

Whereas, the defendant offered evidence which was admitted and uncontradicted, to the effect that the express car was completely demolished, having been telescoped by the baggage car, while the baggage car was but little injured, and that *the chances of being injured in the express car were much greater than in the baggage car* (Rec. pp. 39-43).

The defendant proved by eight uncontradicted witnesses, who viewed the wreck immediately after it occurred, that the express car was completely demolished, while the baggage car, though turned over down the embankment, was practically intact, with the exception of the front end, which had telescoped the express car, and that the baggage in the car was taken out but little damaged (Rec. p. 39), and that *the passengers in the rear end of the said baggage car escaped practically unhurt* (Rec. p. 58).

(4) It is also stated that

"The plaintiff's going into the express car was

not an unlawful act, and under the circumstances could not have affected his employment, or the responsibilities of the company."

(p. 91, Rec.)

Whereas, the defendant offered evidence which showed that the rules of the receivers, known to the plaintiff, required him to remain in the baggage car when not discharging the duties of a flagman or brakeman (p. 46, Rec.) ; and that he had gone into the express car in violation of these rules to assist the express messenger to discharge his duties (Rec. p. 34).

(5) It is also further stated that plaintiff's

"duty lay in the express car as well as in the baggage car, for in the former the through baggage, which was part of his charge, was carried, and though there was none at that time (in the express car) he might prepare to receive such at Sanford."

(p. 91, Rec.)

Whereas, the uncontradicted evidence of both parties showed that the plaintiff *did not go into the express car for the purpose of receiving or handling through baggage* (*Duvall*, Rec. p. 14; *Rowe*, p. 34); and the evidence of the defendant showed not only that the plaintiff was in said car to assist the express messenger, but also that the railroad company had no right to carry baggage of any sort in said express car when there was room for it in the baggage car (Rec. p. 47), as was the case on the night of the collision (*Duvall*, p. 17; *Cox*, p. 48, Rec.).

This erroneous conception of the evidence may serve to show how the Supreme Court of North Carolina reached an erroneous decision upon the law in the case. But where the record itself shows, as it does here, that there was evidence which, under instructions construing the statute correctly, would, or might, lead on a

finding of fact, to a judgment in defendant's favor, the statement by the Chief Justice of certain facts as being established, from which facts his decision would logically follow, is in no wise binding upon this court.

Respectfully submitted,

HILARY A. HERBERT,

BENJAMIN MICOU,

RICHARD P. WHITELEY,

WALTER H. NEAL,

E. T. CANSLER,

Counsel for Plaintiffs in Error.

MOTION TO DISMISS THE WRIT OF ERROR OR AFFIRM THE OPINION AND JUDGMENT RENDERED BY THE SUPREME COURT OF NORTH CAROLINA

NOTICE TO PLAINTIFF IN ERROR

Office Supreme Court U. S.
FILED

AUG 31 1910

JAMES H. MCKENNEY,
Clerk

BRIEF IN SUPPORT OF MOTION OF ERNEST N. DUVALL TO DISMISS THE WRIT OF ERROR OR AFFIRM THE OPINION AND JUDGMENT RENDERED BY THE SUPREME COURT OF NORTH CAROLINA

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910

No. 804

SEABOARD AIR LINE RAILWAY, PLAINTIFF IN ERROR

VERSUS

ERNEST N. DUVALL

IN ERROR TO THE SUPREME COURT OF THE STATE OF
NORTH CAROLINA

(22,199)



MOTION TO DISMISS THE WRIT OF ERROR OR AFFIRM THE OPINION AND
JUDGMENT RENDERED BY THE SUPREME COURT OF NORTH CAROLINA

NOTICE TO PLAINTIFF IN ERROR

BRIEF IN SUPPORT OF MOTION OF ERNEST N. DUVALL TO DISMISS THE
WRIT OF ERROR OR AFFIRM THE OPINION AND JUDGMENT RENDERED BY
THE SUPREME COURT OF NORTH CAROLINA

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910

No. 578

SEABOARD AIR LINE RAILWAY, PLAINTIFF IN ERROR
VERSUS
ERNEST N. DUVALL

N ERROR TO THE SUPREME COURT OF THE STATE OF
NORTH CAROLINA



Supreme Court of the United States,

OCTOBER TERM, 1910.

No. 578.

SEABOARD AIR LINE RAILWAY,
Plaintiff in Error, }
v.
ERNEST N. DUVALL, }
Defendant in Error.

ON WRIT OF ERROR TO THE SUPREME COURT OF NORTH CAROLINA.

Motion on behalf of Ernest N. Duvall to dismiss the writ of error or affirm the opinion and judgment rendered by the Supreme Court of North Carolina.

Comes now the defendant in error, Ernest N. Duvall, by his counsel appearing in his behalf, and moves the Court to dismiss the writ of error in the above-entitled cause for want of jurisdiction upon the following grounds:

1. The Employers' Liability Act of 1908 grants no right, privilege or immunity to the plaintiff in error.
2. No right, privilege or immunity was SPECIALLY SET UP OR CLAIMED in either the trial court or in the Supreme Court of North Carolina.
3. No Federal question was PRESENTED TO OR DECIDED BY the State courts; no such decision was necessary to the determination of the case; there was no denial of any right, privilege or immunity under any statute of the United States, and the judgment as rendered was given without deciding any right, privilege or immunity granted under the Constitution or any act of Congress.
4. Both the trial court and the Supreme Court of North Carolina tried and decided this case under the broad principles of the common law, and no interpretation of the Federal Employers' Liability Act of 1908 became necessary.
5. The only reason suggested for the interference of this Court with the opinion and judgment of the Supreme Court of North Car-

olina is by *vague* and *inferential suggestions* in prayers for instruction and in exceptions to certain instructions given in the trial court, which in no way are connected with the Federal Employers' Liability Act of 1908.

6. This Court has no jurisdiction to review the decision of the highest court of a State upon *pure questions of fact*.

Said defendant in error, by his counsel appearing in his behalf, also (in the event that this Court shall be of the opinion that it has jurisdiction of the writ of error) moves this Court to affirm the opinion and judgment of the Supreme Court of North Carolina rendered May 4, 1910, which opinion and judgment affirmed the judgment rendered by the Superior Court of Moore County on the 29th day of January, 1910, on the ground that although the record may show that this Court has jurisdiction of said writ of error, it is manifest that the writ was taken for delay only, and that the question on which the jurisdiction depends was so frivolous as not to need further argument, and the defendant in error prays for the enforcement of Rule No. 23 of the Supreme Court of the United States in respect to damages in addition to interest.

The grounds of this motion and the statement of the case and facts and arguments are more fully set forth in the brief of counsel for said defendant in error herewith submitted.

WILLIAM C. DOUGLASS,
Counsel for said Defendant in Error.
Ernest N. Duvall.

To SEABOARD AIR LINE RAILWAY, Plaintiff in Error, and WALTER H. NEAL and BENJAMIN MICOU, its Counsel:

Please take notice that on Monday, October 10, A. D. 1910, at the opening of the Court, or as soon thereafter as counsel can be heard, the motions of which the foregoing are copies will be submitted to the Supreme Court of the United States for the decision of the Court thereon.

Annexed hereto is a copy of the brief or argument to be submitted with the said motion in support thereof.

WILLIAM C. DOUGLASS,
Counsel for Defendant in Error,
Ernest N. Duvall.

THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1910.

No. 578.

SEABOARD AIR LINE RAILWAY,
Plaintiff in Error,
v.
 ERNEST N. DUVALL,
Defendant in Error.

ON WRIT OF ERROR TO THE SUPREME COURT OF NORTH CAROLINA.

BRIEF

In support of motion of Ernest N. Duvall, defendant in error, to dismiss the writ of error, or affirm the opinion and judgment rendered by the Supreme Court of North Carolina.

Statement of the Case and Argument.

This was a civil action brought by Ernest N. Duvall, defendant in error (plaintiff in error in the State court and hereinafter designated as defendant in error), for the recovery of damages for injuries sustained by him in a head-on collision while he was on his run as baggage master and flagman on a passenger train being operated by the receivers of plaintiff in error from Portsmouth, Virginia, to Monroe, North Carolina, and points beyond, on the morning of March 13, 1909.

This action was originally brought against the receivers of the Seaboard Air Line Railway, and in the answer filed by them (pages 4 and 5 of the record) they admitted the head-on collision, that the defendant in error was injured by the negligence of the said receivers, and did not plead contributory negligence on the part of the defendant in error. At January Term, 1910, the receivers filed a plea in abatement (pages 6 and 7 of the record) and among other things set up the settlement and discharge of the receivers and alleged that the Seaboard Air Line Railway in taking over the property of the said receivers, and in reassuming control of said railroad, assumed all liabilities, and among them any liability to defendant in error on

account of the injury referred to in the pleadings. Whereupon, the action as to the receivers was allowed to abate (pages 7 and 8 of the record), and on motion, the Seaboard Air Line Railway was made party defendant and hereinafter designated as plaintiff in error, and by agreement filed an unverified answer to the original complaint (pages 9, 10, 11 of the record); the complaint against the receivers being treated and considered by consent as being the complaint against the plaintiff in error. In the unverified answer of the plaintiff in error it denied that the defendant in error, at the time of the injuries received by him, was in the employ of the receivers as baggage master and flagman and in the discharge of his duties as such upon said train; it admitted the head-on collision with a freight train and the derailment of a part of said train; that the defendant in error was wounded and injured to some extent and admitted that the collision and injury to the defendant in error was due to the carelessness of some of the employees of the said receivers. For a further defense in its said answer the plaintiff in error alleged that if the defendant in error was injured as the result of the negligence of the then receivers, which it denied, he caused and contributed to his own injury in that he, in direct violation of the rules of the receivers then in force and known to him, left the baggage car in said passenger train where it was his duty to be and went into the express car of said train which was in the possession and under the control of the agent of the Southern Express Company, for the purpose of assisting such express agent in the discharge of his duties, or for some other purpose in no wise connected with the duties of the plaintiff in error, and while in said express car was injured by the derailment thereof as the result of the collision of said passenger and freight train; but for which negligence and wrongful conduct on the part of the defendant in error in being in said baggage car in violation of the rules of his said employers and going into the express car for the purpose aforesaid he would not have been injured.

There was evidence tending to show that the express car was *always used for through baggage to save transferring* (page 14 of record); that this use of the express car was directed by those in charge (page 14 of the record); that the baggage master and flagman was under the conductor's orders and had to obey them (pages 13 and 46 of the record); that shortly before the collision the defendant in error was directed by the conductor to accompany him into the

express car, and while he and the conductor were in the express car the collision occurred (pages 14, 27, 28 of the record).

There was evidence on the part of the railroad tending to show that there was no baggage in the express car at the time of the collision, and that the defendant in error had gone into the express car shortly before the collision and assisted the express messenger in checking his freight.

At the conclusion of the evidence the defendant in error tendered only two issues, as follows:

1. Was the plaintiff injured by the negligence of the defendant?
2. What damage is the plaintiff entitled to recover?

And the court, under objection by defendant in error, submitted a third issue, as follows:

"Was the plaintiff's injury caused by his contributory negligence?"

The plaintiff in error did not object or except to the three issues submitted and tendered no other issues (pages 11 and 75 of the record).

At the conclusion of the testimony the plaintiff in error prayed the court, among other things, to instruct the jury as follows:

"1. That where an employee undertakes to do something not his duty to do, the master is not negligent; and if the jury shall find by the greater weight of the evidence that the plaintiff was acting outside of his employment when he was injured, they will answer the first issue 'No.'"

"3. That, as the plaintiff admits he was in the express car at the time of his injuries, and as the rules of the receivers of the defendant (of which he admits he had notice) required him to remain in the baggage car when not engaged in flagging the train, the burden is upon the plaintiff to satisfy the jury by the greater weight of evidence that when he went into said express car, and was injured, he was engaged in the discharge of the duties of his employment, and if he has failed to so satisfy the jury you will answer the first issue 'No.'"

"5. Although the jury shall find that the plaintiff, in fact, went into the express car at the request of the conductor, yet unless they shall further find by the greater weight of the evidence that he went because he thought it was his duty to go in obedience to the conductor's orders and not because he was being invited to go to gratify his idle curiosity, the jury will answer the first issue 'No.'"

6. The admitted rules of the receivers of the defendant required

the plaintiff to remain in the baggage car when not engaged in flagging the train, and the plaintiff had no right to go into the express car in violation of the provisions of the said rules, unless the conductor ordered him to do so for the purpose of discharging some one of the duties of his employment; and unless the jury shall find by the greater weight of the evidence that when the conductor told the plaintiff to go with him into said car, he thereby understood that the conductor wished him to go to discharge his duties as an employee of the defendant, the jury will answer the first issue 'No.' " (Pages 75-76 of the record.)

The judge refused to charge the jury as requested, but gave the jury the charge as set forth in full on pages 78, 79, 80, 81, 82, 83 of the record, and upon the refusal of the judge to charge as requested by the plaintiff in error, and in the charge as given by the judge, as set forth above, the plaintiff in error contends that it was *denied a right, privilege or immunity* held by it under the Constitution and statutes of the United States.

This right to writ of error to the Supreme Court of North Carolina is claimed under Revised Statute 709, as amended February 18, 1875, ch. 80, 18 Stat., 318; U. S. Comp. St., 1901, page 575, which provides:

"(1) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, or the decision is against their validity;

"(2) Or where is drawn in question the validity of a statute, or an authority exercised under any statute on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity;

"(3) Or where any right, title, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party, under such Constitution, treaty, statute, commission or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been passed in a court of the United States. The Supreme Court in reversing, modifying or affirming the judgment or decree of the State court may at their discretion award execution or remand the same to the court from which it was removed by the writ."

The Federal Employers' Liability Act, passed by the Congress of the United States of 1908, under which the plaintiff in error claims a right, title, privilege or immunity, is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"SEC. 2. That every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States, shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"SEC. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted

for the safety of employees contributed to the injury or death of such employee.

"SEC. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

"SEC. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt himself from any liability created by this act, shall to that extent be void: *Provided*, that in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

"SEC. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

"SEC. 7. That the term 'common carrier' as used in this act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

"SEC. 8. That nothing in this act shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other act or acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the act of Congress entitled 'An act relating to liability of common carriers in the District of Columbia and Territories, and to common carriers engaged in commerce between the States and between the States and foreign nations to their employees,' approved June eleventh, nineteen hundred and six.

"Approved, April 22, 1908."

I.

The Employers' Liability Act of 1908 grants no right, privilege or immunity to plaintiff in error.

The Federal Employers' Liability Act of 1908, as we understand it, does not undertake to give any title, right, privilege or immunity to any class, person or persons. Clearly, its purpose was to enact A UNIFORM EMPLOYERS' LIABILITY ACT; TO ABOLISH THE DOCTRINE OF

FELLOW SERVANT, AND TO ESTABLISH THE DOCTRINE OF "COMPARATIVE NEGLIGENCE." *The act is in favor of the employee.* In both terms and spirit it *restricts* the railroad company and *enlarges the rights of the employee*, as compared with the common law. It so modifies the defense of contributory negligence that, if any right, privilege or immunity is granted therein, it is to the *employee* alone.

The following statute was enacted by the General Assembly of North Carolina in its session of 1897, and printed in Private Laws, ch. 56 (Revisal of 1905 of North Carolina, see, 2646), and was in force at the time of the trial of this cause:

"Any servant or any employee of any railroad company operating in this State who shall suffer any injury to his person, or the personal representative of such servant or employee who shall have suffered death in the course of his services or employment with such company by the negligence, carelessness or incompetence of any other servant, employee or agent of the company, or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against such company. Any contract or agreement, express or implied, made by any employee of such company to waive the benefit of this section shall be null and void."

The doctrine of assumption of risk has been eliminated by the follow servant act.

- Biles v. Railroad, 143 N. C. Rep., 78.
- Thomas v. Railroad, 129 N. C., Rep., 392.
- Cogdell v. Railroad Co., 129 N. C., 398.
- Coley v. Railroad, 128 N. C., 534.

The act above referred to, "relative to the liability of common carriers to their employees in certain cases," passed and approved by the Congress of the United States April 22, 1908, makes no change in the common law as modified by the statute passed by the General Assembly of North Carolina (copied above) save in the third section thereof, as follows:

"That in all actions hereafter brought against any such common carrier by railway under or by virtue of any of the provisions of this act, to recover damages for an injury to an employee, or where such injuries have resulted in his death, and in that the employee may have been guilty of contributory negligence, shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence and contributory negligence of such employee."

It will be observed that the question of contributory negligence, without objection on the part of the plaintiff in error, was submitted in an issue to the jury in the trial court and answered in the negative (pages 11 and 75 of the record). This being an issue of fact, the question of contributory negligence by the finding of the jury was completely eliminated from this case, and thereafter the trial and proceedings were of necessity identical, whether the case was tried under the act of Congress hereinbefore referred to, or under the common law as modified by the statute of the State of North Carolina. That is to say, the Federal Employers' Liability Act of 1908 differs only in one particular from the common law as modified by the statute of North Carolina, and that is in respect to "comparative negligence." With this question eliminated by the finding of the jury, that there was no contributory negligence on the part of the defendant in error, the trial court was forced to proceed under the principles of the common law in respect to master and servant. Stripped of the question of contributory negligence, only the questions of *negligence* and *damages* remained, and these were purely questions of fact, governed by the law of master and servant as established by the common law.

II.

No right, privilege or immunity was specially set up or claimed in either the Trial Court or in the Supreme Court of North Carolina.

The plaintiff in error, in its answer in the court below (pages 9, 10, 11 of the record), made no reference to nor did it set up or claim any right, privilege or immunity under the Federal Employers' Liability Act of 1908; nor was the act itself introduced or referred to. In the special instructions prayed for by the plaintiff in error (pages 75-78 of the record) the plaintiff in error neither specifically set up nor claimed any right, privilege or immunity under the Employers' Liability Act of 1908, nor was any reference made to the said act in the said court below, except in the charge of the trial judge (page 81 of the record) upon the question of the assessment of damages, and to which no exception was taken and no complaint made by the plaintiff in error. The prayers for special instructions to the jury made by the plaintiff in error in the trial court, *and which the judge evidently refused because there was no evidence to sustain such instructions,*

and to which plaintiff in error excepted in its petition for writ of error (page 97 of the record), and the instructions given by the judge in the trial court and which bore directly on the evidence and issues and excepted to by the plaintiff in error, were based upon the construction of the common law relative to master and servant as contended for in the trial court by the plaintiff in error.

The first prayer for instructions which the court refused and to which plaintiff in error excepted (page 97 of the record), is almost in the exact language of an instruction prayed for in a case tried in the State courts of North Carolina, brought for damages to a cotton mill employee at common law (*Patterson v. Manufacturing Co.*, 145 N.C., page 44), and the other instructions prayed for embodied simple principles of the common law.

When the case was brought by appeal to the Supreme Court of North Carolina, no claim or right under the said act of Congress was urged, even if such claims or right could have been specifically claimed or set up for the first time in the appellate court, but plaintiff in error simply contended under common law authorities that under the evidence in the case the defendant in error, at the time he was injured, had stepped beyond the sphere of his employment, was out of the line of his duty and was a bare licensee or trespasser. For the first time, the plaintiff in error urged, in the Supreme Court of North Carolina, "that, being out of the line of his duty," in the act of 1908 had a different meaning from "being out of the line of his duty at common law" as respects master and servant. But the trial and appellate courts of North Carolina proceeded to hear and determine the question of being out of the line of duty upon the principles of the common law.

Full faith, credit and validity was given the Employers' Liability Act of 1908, in so far as the same touched or applied to this case, in the trial court, and the judge of said court, at the close of his charge (page 82 of the record), inquired of the counsel of both plaintiff and the defendant if they desired any further instructions to the jury or wished any particular phase of the evidence commented on before the jury, or if there were any further instructions desired upon any line to which counsel for both plaintiff and defendant replied there were not. Evidently, the plaintiff in error, if it had any purpose in mind to raise a Federal question, studiously avoided making its position known to the court and thoroughly concealed its purpose. The con-

tentions of the plaintiff in error in the Supreme Court of North Carolina (page 91 of the record) were as follows:

1. That at the time of the injury the plaintiff was not an employee of the defendant.
2. That he was not injured in interstate commerce.
3. That he was not injured as the result of the defendant's negligence.

Upon these three propositions the plaintiff in error contends that it "specially set up and claimed a right, privilege and immunity under the Federal Employers' Liability Act of 1908."

As to the first proposition, we can hardly see how the plaintiff in error, under the pleadings and evidence in the case, can have the hardihood to insist upon this position.

As to the second proposition, we might well admit, for the sake of argument, that the defendant in error was not injured in interstate commerce. It is admitted that he was injured, and if he was injured in *intrastate* commerce, the argument of the plaintiff in error loses all of its force.

As to the third proposition, the admissions in the answer of the plaintiff in error, and all of the evidence in the case, fairly show that the defendant in error was injured by the negligence of the plaintiff in error. The Congress, in the enactment of the Federal Employers' Liability Act of 1908, certainly had no intention, and in fact did not alter the law of master and servant as respects injuries to servants "while acting outside of the line of their duties or the scope of their employment." The common law governing the relation of master and servant is too well established to be subjected to a new and restricted constriction by the wording of this act of Congress. We mean to say that when the Congress of the United States, in the Federal Employers' Liability Act of April 22, 1908, used this language, "Shall be liable in damages to any person suffering injuries while he is employed by said carrier in such commerce," did not intend, and in fact did not alter in any way the common law in respect to a servant's injury when he had departed from the sphere of his assigned duty, and when the relation of master and servant has been temporarily suspended, and the position of the servant became that of a trespasser or bare licensee. *And in order that the plaintiff in error might avail itself of the defense that the defendant in error at the time he received his injury was out of the line of his duty and became*

a trespasser or bare licensee, must have availed itself of and depended solely upon the principles of the common law.

Nowhere in the answer of the plaintiff in error did it set up or claim any right, privilege or immunity under a Federal statute. It is true that it denied that the defendant in error was at the time of his alleged injury in the employment of the plaintiff in error as baggage master and flagman and in the discharge of his duties as such upon said train. Can it be said that this is specially setting up or claiming a right, privilege or immunity under the Employers' Liability Act of 1908? Was not this denial in the answer as much a defense under the common and statute law of North Carolina as under the act of Congress in question? Did not such denial raise the same issue under the common and statute law of North Carolina as under the act of Congress? Where is the right, immunity or privilege specially set up or claimed? No issue was tendered or submitted on the so-called right, privilege or immunity. The fact is that what the plaintiff in error is attempting to claim as a special right, privilege or immunity under the Federal Employers' Liability Act of 1908 is a broad principle of the common law, to be applied in the trial of a cause upon the evidence adduced whether the trial is had upon an act of Congress or at common or statute law. The plaintiff in error, in order to sustain the writ of error, sets out a summary of the evidence deduced in the trial court. Can this court, upon the hearing of this writ, go into an examination of the evidence for the purpose of ascertaining whether or not, in the first place, the plaintiff in error was entitled to the said instructions, and if so entitled, was such failure to so instruct the jury the denial of a right, privilege or immunity under the act of Congress? This would surely be a roundabout way to get at a right, privilege or immunity which must be specially set up or claimed. The effect of the decisions in the State and the Supreme Court of North Carolina was not to deny a right, privilege or immunity under the Federal Employers' Liability Act of 1908, if the plaintiff in error had such right, but simply to hold that in the case the plaintiff in error was not entitled to certain instructions, the denial of which was simply a refusal of the court to accept the construction and application of certain common law principles from the viewpoint of the plaintiff in error.

The judge of the trial court could never have gathered from the answer, the evidence, the issues, or the prayers for instructions in

this case that the plaintiff in error had the most remote idea of claiming a right, privilege or immunity under any United States statute.

In the Supreme Court of North Carolina the plaintiff in error did not ask for a reversal of the judgment because the court below had held against it any right, privilege or immunity to which it was entitled under the Federal Employers' Liability Act of 1908, nor did it designate any right, privilege or immunity.

In the petition for this writ of error and in the exceptions to the judgment of the Supreme Court of North Carolina filed herein the plaintiff in error still fails to designate what right, privilege or immunity it holds under the Federal Employers' Liability Act of 1908 and which was denied it by the State court.

The third division of section 709 of the Revised Statutes of the United States refers to "*tangible rights, privileges or immunities*" distinctly set forth in the statute relied upon, and not to such vague and uncertain benefits as a party might derive from certain instructions to the jury, which, in some view of the case, might lead to a beneficial finding by the jury, nor could instructions given to a jury in the trial court amount to a denial of any right, privilege or immunity where no such rights, privilege or immunity was specially provided for in the statute.

Mr. Justice Day, in delivering the opinion of the court in *Chesapeake and Ohio Railroad Co. v. McDonald, Admr.*, 214 U. S., at pages 192 and 193, says:

"The right to review a judgment of the State court by error proceedings in this court is regulated by section 709 of the Revised Statutes of the United States. To lay the foundation of such right of review, it is necessary to bring the Federal question in some proper manner to the consideration of the State court whose judgment it is sought to review; if this is not done, the Federal question can not be originated by assignments of error in this court. The Federal right asserted in this case comes within the third class named in section 709 of the Revised Statutes, wherein a right, privilege or immunity claimed under the United States and the decision is against such right, title, privilege or immunity. In this class of cases the statute requires that such right or privilege must be specifically set up and claimed in the State court, and in any of the classes of cases mentioned in section 709 it is essential that the record disclose that the Federal question involved was decided, or that the judgment necessarily involved the Federal right and decided it adversely to the claims of the plaintiff in error." "It is well settled that this court

on error to a State court can not consider an alleged Federal right thus relied upon which had not been by adequate specifications called to the attention of the State court and had not been by it considered, not being necessarily involved in the determination."

"To give the court jurisdiction to revise the judgment of the State court, it must appear that the point upon which the plaintiff in error relies was made in the State court and decided against him, that the statute relied on was brought to the notice of the State court and the right which he now claims here was claimed under it."

Maxwell v. Newbold, 18 How., page 511.

Michigan Sugar Co. v. Dicks, 185 U. S., 112.

F. G. Oxley Stone Co. v. Butler County, 166 U. S., 648.

Miller v. Texas, 153 U. S., 535.

A. J. Kiser v. Texarkana and Fort Worth Railroad Co., 179 U. S., page 20.

Brooks v. Missouri, 121 U. S., 394.

Warfield v. Chaffin, 91 U. S., 690.

O'Neal v. Vermont, 144 U. S., 335.

Southern Railway Co. v. Carson, 194 U. S., 136.

"In order to give this court jurisdiction because of the denial by the State court of any right, privilege or immunity claimed under the statute, it must appear on the record that it was duly set up in the trial court that the decision was adverse and that the decision was made in the highest court of the State."

Speas v. Illinois, 123 U. S., 131.

III.

No Federal question was presented to or decided by the State Court; no such decision was necessary to the determination of the case; there was no denial of any right, privilege or immunity under any statute of the United States, and the judgment as rendered was given without deciding any right, privilege or immunity granted under the Constitution or any act of Congress.

"That this court may have jurisdiction of this writ of error, it must appear affirmatively not only that a Federal question was presented for decision by the State court (which the defendant in error denies), but that its decision of the Federal question was necessary to the determination of the case and that it was actually decided

adversely to the party claiming the right under the statute, or that the judgment as rendered could not have been given without deciding it."

Harrison v. Morton, 171 U. S., page 38.

William P. Marrow *et als.* v. Mrs. Joseph Brinkley *et als.*,
129 U. S., 178.

Pearce v. Summerset Railway Co., 171 U. S., 641.

Eustis v. Bowles, 150 U. S., 361.

Missouri Pacific Railway Co. v. Fitzgerald, 160 U. S., 566.

We have in a former part of this brief argued that there could have been no difference in the trial of this cause under the Federal Employers' Liability Act of 1908, and the common law as amended by the statute law of North Carolina; that the principles and law governing the trial of one of necessity governs the trial under the other, and that certainly the decision of no Federal question was necessary to the determination of the case. In fact, it will appear from the decision of the Supreme Court of North Carolina (page 91 of the record) that no Federal question was decided, and that as a matter of fact the judgment as rendered was given without deciding a Federal question. The Supreme Court of North Carolina based its judgment upon a ground other than a Federal question, and this Court has no revising jurisdiction, although the decision of the Supreme Court of North Carolina may be unsound.

DeSaussure v. Gaillard, 127 U. S., 488.

Brooks v. Missouri, 124 U. S., 394.

Detroit City Railroad Co. v. Guthard, 114 U. S., 133.

"It is not enough to give this court jurisdiction over the judgment of a State court for the record to show that a Federal question was argued and presented to the Supreme Court of the State. It must appear that its decision was necessary to the determination of the cause and that it was actually decided, or that the judgment could not have been rendered without deciding it."

Moon v. Mississippi, 88 U. S., 21.

Bowling v. Levener, 91 U. S., 594.

Brown v. Atwell, 92 U. S., 327.

Louisiana v. Louisiana Board of Liquidation, 98 U. S., 140.

Decatur Bank v. St. Louis Bank, 21 Wall., 194.

Endowment Benevolent Assn. v. Kansas, 120 U. S., 103.
Commercial Bank of Cincinnati v. Buckingham, 5 How., 317.
Chauteau v. Gibson, 111 U. S., 200.
Detroit City Railroad Co. v. Guthard, 114 U. S., 133.
Sengle v. Hagar, 4 Wall., 431.
Kinger v. Missouri, 13 Wall., 257.
Cox v. Texas, 202 U. S., 446.
Chapman v. Coon, 123 U. S., 540.
Missouri Railroad Co. v. Mary Fitzgerald, Admix., 160 U. S.,
576.

IV.

Both the Trial Court and the Supreme Court of North Carolina tried and decided this case under the broad principles of the common law and no interpretation of the Federal Employers' Liability Act of 1908 became necessary.

In sifting this matter down the court will find that the Federal Employers' Liability Act of 1908 was not drawn in question; that there was no decision against its validity and that no construction was put upon said act by the trial court below or the Supreme Court of North Carolina; that no right, privilege or immunity was claimed by the plaintiff in error under the said Federal Employers' Liability Act nor was the said act in any way passed upon by either of said courts. The court, upon an examination of the record, will find the gist of the complaint of the plaintiff in error to be the failure of the courts to hold that "*the defendant in error at the time of the injury received by him had departed from the sphere of his assigned duties and that the relation of master and servant was temporarily suspended and his position became that of a trespasser or bare licensee.*" How can these become Federal questions when the decision was based upon rules of general jurisprudence and disposed of on other grounds broad enough in themselves to sustain the judgment without construing the Federal Employers' Liability Act in any way? The defendant in error contends that the only authority and the only ground for the interference by this Court with the decision of the State tribunal is, in substance, that said State tribunal had overruled some right or decision set up under the act of Congress. As before stated, it must appear that a Federal claim of right was interposed in the State court; plaintiff in error must bring its case within the spirit and

letter of the law allowing the writ. There must be direct resulting injury from the denial of the existence of the right, privilege or immunity. In short, to give this Court jurisdiction of this case, the validity of the Federal Employers' Liability Act of 1908 must have been in question in the Supreme Court of North Carolina; in other words, it was necessary that the decision of the Supreme Court of North Carolina be adverse to the rights of claimant under the Federal Employers' Liability Act of 1908. The defendant in error contends that the record discloses the fact that no Federal question was raised, considered or decided in this case, and that the decision rested on nonfederal grounds.

- Scott v. Jones, 5 How. (U. S., 46), 374.
- Crowell v. Randolph, 10 Peters (35 U. S.), 391.
- McQueen v. Trenton, 172 U. S., 636.
- Howard v. Fleming, 191 U. S., 126.
- U. S. v. Lynch, 137 U. S., 280.
- Cook County v. Calumet, etc., Canal Co., 138 U. S., 635.
- Miller v. Cornwall Railroad Co., 168 U. S., 131.
- Kenwood v. Nebraska, 186 U. S., 304.
- Foster's Federal Practice, 3d Ed., Vol. II, page 1187.
- Kennebec, etc., Railroad Co. v. Portland Railroad Co., 81 U. S., 850.
- Adams v. Burlington, etc., Railroad Co., 112 U. S., 678.
- Murdock v. Memphis, 20 Wall., 590.
- Chanteau v. Gibson, 20 Wall., 400.
- Hopkins v. McClure, 133 U. S., 380.
- Hale v. Aikens, 132 U. S., 554.
- Henderson Bridge Co. v. Henderson City, 141 U. S., 679.
- Movan v. Horsky, 178 U. S., 208.

The following doctrine on this subject will be found in Rose's Code of Federal Procedure, Vol. I, sec. 38 (h):

"The test is, could the judgment as rendered, have been given without deciding the Federal question? It is not every decision that is against the party raising a Federal question that is reviewable, for the decision may go against the party on many grounds without touching the merits of the Federal question raised. Thus, the appellate court may rest its affirmance of the judgment on some question of practice or pleading or may dismiss the suit for want of

jurisdiction and such a decision is not adverse to a Federal right or claim."

Again, section 38 (j) of the same volume:

"Since it is a decision against a Federal right or claim, and not against the party raising it, that is reviewable, writs of error will not lie where the State decision is sustainable upon nonfederal grounds. Hence, where the record shows a Federal and a nonfederal question, and the case was disposed of below on the latter, there is no right of review, or if it might have been so disposed of; moreover, if the record does not show that the decision below was on the nonfederal ground, yet, error will not lie if a nonfederal ground is apparent upon which the decision might be rested; so that the decision would have been the same if no Federal question had been raised."

In a recent decision this Court has said:

"We have repeatedly held that even the decision by the State court of a Federal question will not sustain the jurisdiction of this court if another question, not Federal, were also raised and decided against the plaintiff in error, and the decision thereof be sufficient, notwithstanding the Federal question, to sustain the judgment. Much more is this the case where no Federal question is shown to have been decided and the case might have been, and probably was, disposed of upon nonfederal grounds."

McQuade v. Trenton, 172 U. S., at page 639, and cases cited.
 Hammond v. Johnson, 142 U. S., at page 78, and cases cited.
 New Orleans v. New Orleans Water Works Co., 142 U. S., 79.
 Wade v. Lawder, 165 U. S., 624.
 Giles v. Teasley, 193 U. S., 146.
 Egan v. Hart, 165 U. S., 193.
 California Powder Works v. Davis, 151 U. S., 389.

It has also been held that when the decision in the State court is on two grounds, Federal and nonfederal, that this Court has no jurisdiction to review.

Miller v. Central Illinois Railroad Co., 168 Fed., 982.
 Nelson v. Southern Ry. Co., 172 Fed., 478.
 Crowell v. Schumaker, 10 Peters, 368.
 Bridge v. Hoboken, 1 Wallace, 116.
 Brown v. Colorado, 106 U. S., 95.

V.

The only reason suggested for the interference of this Court with the opinion and judgment of the Supreme Court of North Carolina is by vague and inferential suggestions in prayers for instructions and in exceptions to certain instructions given by the Trial Court which are in no way connected with the Federal Employers' Liability Act of 1908.

In *Thomas v. Iowa*, 209 U. S., at pages 261-262, Mr. Justice Moody delivering the opinion of the Court, uses the following language:

"The count of the indictment upon which the verdict was returned alleged that the accused deliberately, premeditatedly and with malice aforethought, murdered one Mabel Schofield by administering poison to her. The judge presiding at the trial instructed the jury in substance that if they were satisfied that the accused administered poison to Mabel Schofield unlawfully and with bad intent, and that she died from the poison thus administered, then they should find him guilty of murder in the first degree, although there was no specific intent to kill. This instruction was approved by the Supreme Court as a correct expression of the law of the State. With that aspect of the question we have nothing to do. But it is assigned as error and argued here that this instruction in effect withdrew from the jury the effect of the degree of murder, and to that extent denied the plaintiff in error a trial by jury, and therefore denied him due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. Without intimating that upon this statement any Federal question is presented, we must first consider whether the question was raised in the court below in such a manner as to give us jurisdiction to consider it. There is nothing in the record to show that it was raised. The plaintiff in error duly and seasonably excepted to the instructions complained of, but in no way was it then indicated (except as hereafter appears) that he claimed that any right under the Federal Constitution was impaired by them."

And at page 263:

"The Federal question, if it can be found at all in the record, must be found in this statement. It is too late to raise it for the first time in the petition for writ of error from this court, or in the assignment of errors here. *Hare v. Rice*, 204 U. S., 291. All that appears in the statement is that certain exceptions were taken to certain parts of the charge to the jury, because they 'in effect deprived the plaintiff

in error of his liberty without due process of law'; and that the question thus raised was discussed before the Supreme Court of the State. But something more than this vague and inferential suggestion of a right under the Constitution of the United States must be presented to the State courts to give us the limited authority to review their judgments; which exists under the Constitution and is regulated by section 709 of the Revised Statutes. A mere claim in the court below, that there has been a denial of due process of law, does not of itself raise a Federal question with sufficient distinctness to give us jurisdiction to consider whether there has been a violation of the Fourteenth Amendment of the Constitution."

The following cases decided by this Court are to the same effect:

- Kansas City Star Co. v. Julian, 215 U. S., 589.
- Vandalia Railroad Co. v. South Bend, 207 U. S., 369.
- Lethe v. Thomas, 207 U. S., 93.
- Arkansas Southern Ry. Co. v. German Bank, 207 U. S., 270.
- Waters-Pieree Oil Co. v. Texas, 212 U. S., 112.
- Thomas Murdock v. Mayor and Aldermen of Memphis, 20 Wall., page 590.
- Ocean Insurance Co. v. Polleys, 13 Peters, 157.

VI.

This Court has no jurisdiction to review the decision of the highest court of a State upon pure questions of fact.

The questions upon which the plaintiff in error relies for its writ of error arose in the trial court upon prayers for instructions and upon certain instructions given by the trial judge in the trial court. The refusal to charge, as requested, and the charge as given, depended entirely upon the evidence and the law as applicable thereto, which law is the same whether the trial be had under the act of Congress or under the common and statute law. Whether an employee is acting in the line of his duty in the same proposition whether arising under the State, the common law, or a Federal statute. It could make no difference in this case, in so far as the liability of the railroad is concerned, whether defendant in error was engaged in interstate traffic or in intrastate traffic. The same law would be applicable in either case. Whether or not defendant in error was in the line of his duty or in the scope of his employment, are dependent upon the evidence in the case to be applied under the rules of the common law. This

Court has held that it has no jurisdiction to review the decision of the highest court of the State upon a pure question of fact, although a Federal question would or would not be presented according to way in which the question was decided—a writ of error brings up questions of law only.

Dower v. Richards, 151 U. S., 658.
Sayward v. Denny, 158 U. S., 180.

The opinion of the Supreme Court (page 91 of the record) states, and the same is borne out by the entire record, that the plaintiff in error contends that under the Federal Employers' Liability Act the defendant in error is not entitled to recover, for three reasons, viz.:

First. At the time of the injury the plaintiff was not an employee of the defendant.

Second. That he was not injured while engaged in interstate commerce.

Third. That he was not injured as the result of the defendant's negligence.

These are pure questions of fact and were passed upon by the jury in the trial court. The decision of the jury in either way, favorable or unfavorable to the plaintiff in error, would not have presented a Federal question within the meaning of the Judiciary Act, Revised Statutes, see, 709.

In this case, the Court cannot look into the character or quantum of evidence upon which an instruction was asked and refused, or upon which an instruction given to the jury was based in the trial court in order to find whether any claim or right or immunity was denied the plaintiff in error under the statute of the United States, but can only examine the proceedings for the purpose of ascertaining whether or not the decision of the trial court and the Supreme Court of North Carolina denied to it any right, privilege or immunity granted to it under the Federal Employers' Liability Act of 1908 which was specially set up or claimed by it in the trial court and in the Supreme Court of North Carolina.

VII.**Construction of Act.**

The plaintiff in error declares, in its application for writ of error and exceptions taken, that the Supreme Court of North Carolina placed a *restricted construction* on the Federal Employers' Liability Act of 1908. The act, we take it, means what it says; when it states that under certain circumstances railroad companies shall be guilty of negligence, this negligence must be deducible from the evidence and determined under the rules of common law, and so with every part of said act. We contend that there was no necessity of construing this act, but if the courts of North Carolina had been compelled to have construed the act in order to have rendered the judgments and orders therein, they would have had no other guide than the rules and principles of the common law and the decisions thereunder, and this Court would have had no jurisdiction to review the construction of the act in question by the State courts of North Carolina.

In *Rakes v. United States*, 212 U. S., 58, the defendant was convicted under sections 5508-5509 of the Revised Statutes for murder in the second degree. The case was taken to this Court on writ of error, and in the course of the opinion (on page 58) the Court says:

"Nor can we see that the case involved the construction or application of the Constitution of the United States, or drew in question the constitutionality of a law of the United States, because no definite issue was raised in regard thereto, and while, in the brief of counsel for plaintiff in error, it was suggested that section 5509 was unconstitutional, that contention, however presented, was long since put at rest. An assertion of errors of construction furnishes no basis for jurisdiction on constitutional grounds under section 5 of the Act of March 3, 1891."

In this brief we have not directed our argument to that part of the Revised Statutes, sec. 709, which provides for a review of the State courts where—

"(1) A final judgment or decree in any suit in the highest court in a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, or the decision is against their valid-

ity," because nowhere in the record does it appear that the validity of any treaty or statute of, or any authority exercised under the United States was drawn in question, or that the decision was against the validity of any treaty, statute or authority exercised under the United States."

Nor have we considered that part of the Revised Statutes, sec. 709, which provides—

"(2) Or where is drawn in question the validity of a statute, or an authority exercised under any statute on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity,"

because there is no claim in the record that such is the case here.

For the foregoing reasons the writ of error should be dismissed as to the defendant in error, Ernest N. Duvall, or, if this Court is of the opinion that it has jurisdiction of this writ of error, then, as it is manifest that the writ was taken for delay only and that the question on which the jurisdiction depends is so frivolous as not to need further argument, the opinion and judgment of the Supreme Court of North Carolina of May 4, 1910, should be affirmed, and defendant in error respectfully submits that the fact that this writ was so apparently taken for delay only, the Court should apply the provisions of Rule 23 of the Supreme Court of the United States, and tax the plaintiff with damages in addition to interest.

WILLIAM C. DOUGLASS,
Counsel for said Defendant in Error,
Ernest N. Duvall.